Dec 21 1870

Carpenter 11

Argued 10 to 12

Mr. Justice Clifford

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~235.~~ 57

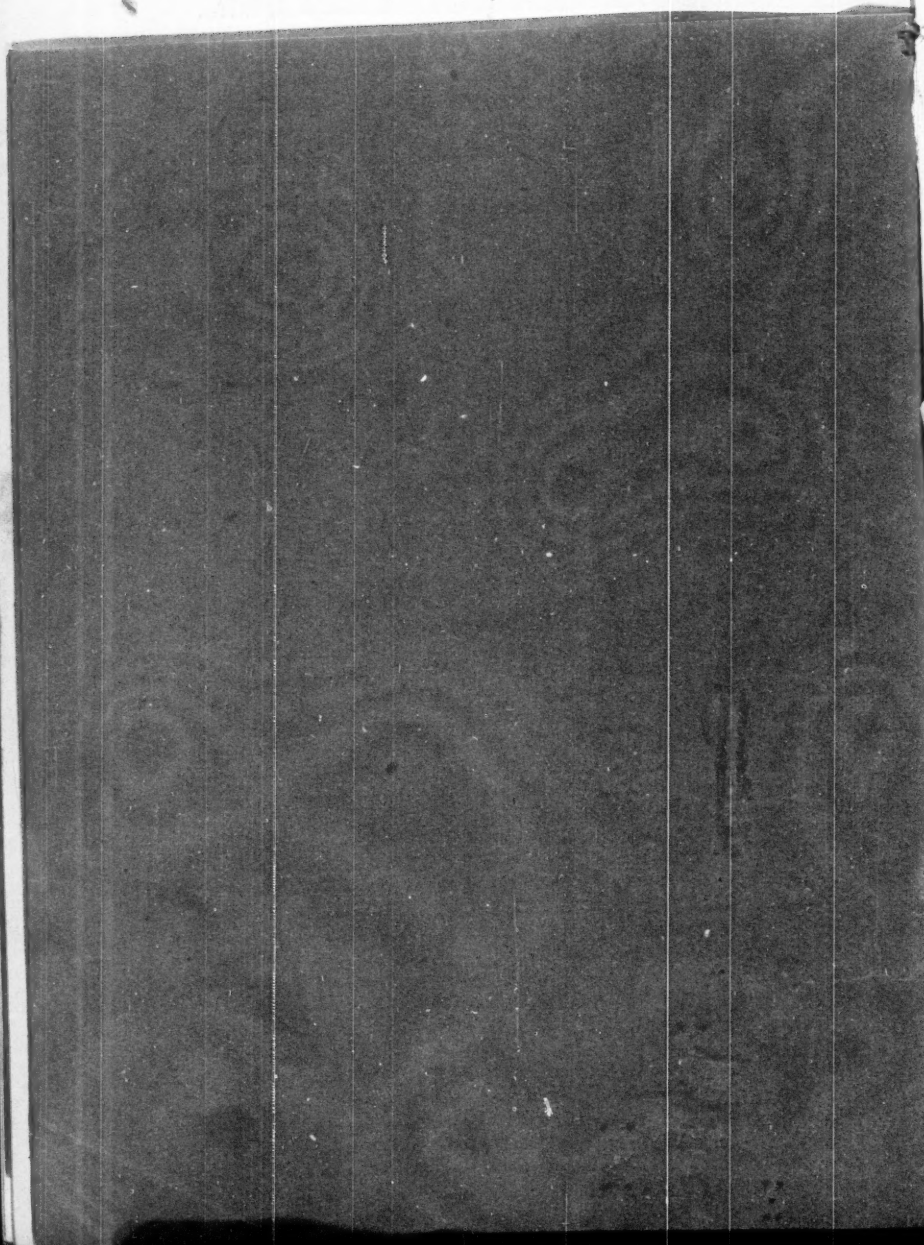
RYNIER V. YATES, APPELLANT,

vs.

THE CITY OF MILWAUKEE AND ALEXANDER MILLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

FILED MAY 26, 1869.



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1 Circuit court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the fourteenth day) of September, A. D. 1868—present, the Honorable Andrew G. Miller, district judge, presiding; also present, Edward Kurtz, clerk of said court, and Cassius Fairchild, marshal for said district—among other, the following proceedings were had, to wit:

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER. } In equity.

Be it remembered that heretofore, to wit, on the 19th day of December, A. D. 1864, came the above-named complainant, by his solicitor, Peter Yates, and filed his bill of complaint against the above-named defendants, as follows, to wit:

Bill of complaint.

To the judges of the circuit court of the United States for the district of Wisconsin:

Rynier V. Yates, of Utica, Oneida County, State of New York, and a citizen of said State of New York, brings this his bill against the City of Milwaukee, a municipal corporation duly created by the laws of the State of Wisconsin, and Alexander Miller, of the city of Milwaukee, and a citizen of the said State of Wisconsin, and thereupon your orator complains and says that he has the possession & legal title to the following described premises, situate, lying, & being in the Fourth
2 ward of the city of Milwaukee, & State of Wisconsin, to wit: Commencing at a point in block No. 158 in said ward, on the south side of the Menomonee River, which is on a line with the dock on the west side of the Milwaukee River, next north of the Menomonee River as said dock was on the 22d day of May, 1856, and running thence from said point on the present line of docking on the south side of the Menomonee River easterly, to the middle of the Milwaukee River; thence southerly with the center of said last-mentioned river to the section line; thence west on said section line to Point street; thence northwesterly along the north side of Point street to a point on a line with the point of commencement & the line of docking on the west side of the Milwaukee River, north of the Menomonee River, as it was on the said 22d day of May, 1856; thence north on said last-mentioned line to the place of beginning.

And your orator further states & shews upon information and belief that, in the summer & fall of the year 1856, Peter Yates, the then owner of said premises, and next immediate grantor of said premises to your orator, at an expense of over five thousand dollars, as he has been informed & believes, drove spiles and erected a wharf upon the west end of the before-mentioned & described premises, a distance down the Menomonee River of about one hundred & five feet, & then down the Milwaukee River a like distance, and then drove spiles about six feet apart on Point street, about twelve feet south of the north line of said

Point street, and erected upon said spiles a wharf composed of timber, each piece a foot square, 4 feet high, and filled in the whole space described with sand & dirt at an expense exceeding two thousand dollars for dredging alone, & thus erecting a wharf or dock at the confluence of the Menomonee River with the Milwaukee River of about one hundred & five feet square, besides about twelve feet of street (Point street) on the south side thereof.

3 And your orator further states & shows upon information & belief that, at the September term, 1856, of the circuit court of Milwaukee County, the said Peter Yates was indicted for having erected the said wharf at said place as an obstruction to the navigation of said Milwaukee River; that, at the same term of court, to wit, Oct. 8, 1856, a bill in equity was filed in the same court by the said City of Milwaukee, as plaintiff, against the said Peter Yates & one Clark Shepardson, as defendants, in which the erecting of said wharf or dock was complained of as an obstruction to the public navigation, and an injunction against the same prayed for; that, on the same 8th day of Oct., 1856, the said Peter Yates appeared in said equity suit & filed his affidavit, denying all encroachment upon the navigable part of said river, setting forth the finding of said indictment for a nuisance, & declaring himself ready for trial thereon. And thereupon, Oct. 16, 1856, the following order was entered in said suit, as by the records & proceedings of said court, ready to be produced & proven as this honorable court shall direct, will more fully & at large appear:

"OCTOBER 16, 1856.—And now, at this day, the court being well and sufficiently advised of & concerning the application for an injunction heretofore made in this case, the same having been argued & submitted, it is considered & adjudged that said application be, and is hereby, overruled & denied."

And that said suit in equity has never been prosecuted further.

That the said Peter Yates pleaded not guilty to said indictment, and, at a subsequent term of said court, was duly tried, & found not guilty by the jury, & acquitted & discharged of the said imputed offence, as by the records of said circuit court of Milwaukee County, ready to be produced & proven, as this honorable court shall direct, will more fully and at large appear.

And your orator further states & shews, upon information & belief, that, at the April term, 1857, of the same circuit court, the said Peter Yates was again indicted for the same alleged obstruction & nuisance, to which last indictment he pleaded auterfois acquit, to which

4 plea the State of Wisconsin, by her attorney, demurred, & which demurrer was overruled by the court, and the said Peter Yates was thereupon again acquitted & discharged, & held to go without day from the said imputed offence, as by the records of said court, ready to be produced & proven as this honorable court shall direct, & will more fully and at large appear.

And your orator further states & shows to this honorable court, upon information & belief, that, at the July term, 1863, of the municipal court of Milwaukee County, the said Peter Yates was again indicted for having erected & continued the said wharf, and that the same was an obstruction to the navigation of the Milwaukee River, and a common and public nuisance; that he was duly arrested upon a bench warrant issued by said court, arrested & brought in to answer & plead to said last-mentioned indictment; that, thereupon, he made & filed an affidavit agreeably to the statute in such case made & provided for the removal of said indictment, and the trial thereon, to the circuit court of Milwaukee County;

that an order for such purpose was accordingly entered in the said municipal court, & the said indictment transmitted accordingly; that in said circuit court the said Peter Yates again pleaded auterfois acquit to the last-mentioned indictment; that the said State of Wisconsin, by her attorney, again demurred to the two pleas of auterfois acquit pleaded by said Peter Yates, and the said Peter Yates joined in demurrer; that, after argument of the same, the circuit court again overruled the said demurrers of the State, & allowed the State to take issues upon the matters set forth in the said pleas, which the State did do by replying that the several erections & obstructions, & the continuance of the same, as set forth in the indictment, & the said several erections & obstructions, & the continuance of the same, as specified & set forth in said pleas, were not the same, but other & different; that the said last-mentioned
5 indictment was thereupon tried upon that issue, and the jury empannelled in said case again found the said Peter Yates not guilty, & he was thereupon again acquitted & discharged, as by the records of said court, ready to be produced & proven as this honorable court shall direct, will more fully & at large appear.

And your orator further states & shows, upon information & belief, that thereafter, to wit, on the 20th day of April, 1864, the common council of the city of Milwaukee passed a joint resolution requiring the chief of police of said city to give notice to the claimant or claimants of the obstruction known as the Yates and Shepardson obstruction in the Milwaukee River, east of lot 1, in block 158, in the Fourth ward of the city, (being the same premises & wharf hereinbefore mentioned,) to remove the same up to the established dock line of the river at said point within sixty days from the date of said resolution or order; & that in case of the neglect or refusal of said Yates & Shepardson to remove the same by the first day of June (then) next, that the comptroller of the city let the contract of removing said alleged obstruction to the lowest responsible bidder, & that the city would indemnify & save harmless any such contractor or contractors, & all persons employed by them, by reason of any act authorized & done under such contract.

And your orator further shows, upon information & belief, that the premises & wharf was owned by your orator, & the wharf of said Shepardson adjoining the same on the west, are the "obstruction" mentioned & described in said resolution & none other; & that since the erection of the same by said Peter Yates, in 1856, the same has not been increased, enlarged, or extended by them, or either of them, or by any person whatsoever, & that the same is not an "obstruction" or nuisance now, and was not in 1856, when the said wharf was completed.

And your orator further shows, upon information & belief, that the said alleged "obstruction" not having been removed, Ferd. Kuehn, city comptroller, on the 1st day of October, 1864, gave notice as
6 required by said resolution, for the letting of the contract specified, & had the same published in the official paper of the city, which notice, as printed in said paper, is hereto subjoined, and reads as follows:

"*Notice.*

"CITY COMPTROLLER'S OFFICE,
"*Milwaukee, October* 1, 1864.

"Pursuant to a resolution of the common council, passed April 20, 1864, notice having been given by the chief of police to the claimant or claimants of the obstruction known as the Yates & Shepardson obstruction in the Milwaukee River, east of lot 1, in block 158, in the Fourth

ward of the city, to move the same up to the established dock line of the river at said point within sixty days from the date or said order, and said claimant or claimants not having complied with such order within the time limited:

"In uniformity with the resolution aforesaid, notice is hereby given that I shall receive proposals at this office until Monday, Oct. 10, 1864, for the removal of the obstruction aforesaid in the Milwaukee River, east of lot 1, in block 158, in the Fourth ward of the city of Milwaukee, up to the established dock line of said river at said point.

"The contract will be awarded to the lowest responsible bidder, and the city will indemnify and save harmless any such contractor or contractors, and all persons employed by them, by reason of any act authorized and done under any such contract.

oct2dtt] "FERD. KUEHN, *Comptroller.*"

And your orator further shows, upon information & belief, that agreeably to said notice the contract therein mentioned was on the 17th day of December, 1864, duly let to the said Alexander Miller, (whom, together with the said City of Milwaukee, your orator prays may be taken & made parties defendants to this his bill of complaint,) who now threaten immediately to tear up, destroy, & utterly demolish the said wharf & premises of your orator, unless restrained by the order & injunction of this honorable court.

7 And your orator further shows, upon information & belief, that the said dock or wharf premises of your orator have, ever since the completion of said wharf, been used as a place of receiving, storing, & shipping brick, lumber, wood, timber, &c., to and from vessels engaged in the navigation & commerce of the lake & the city, and have also been used as a ship, timber, & lumber yard, and is now in use as a wood and coal yard, at rents varying from $300 to $600 per annum; that said premises are only useful & valuable for such and warehouse purposes, & for these purposes they are as valuable, if not the most valuable of any property of that character in the city of Milwaukee, & are worth the sum of $300 per foot front, and over thirty thousand dollars in the aggregate; that to tear up the dock & spiles, & dredge the same out as proposed & threatened by the said city & said Miller, is utterly and totally to destroy the whole value thereof, and an irreparable injury to the rights of property of your orator; that the said defendants sometimes allege and pretend that the place where the said wharf of your orator was erected, was in the navigable part of the channel of the Milwaukee River, and therefore a common & public nuisance; and at other times that the grounds where said wharf was erected was dedicated to the public by the original proprietors for a public basin or enlargement of the navigable capacity of the river, and that the said grounds were therefore public & not private property; whereas your orator charges the contrary thereof to be the truth, & that at the time & place where the said wharf was erected, & more than one hundred feet farther east, into the Milwaukee River, the average depth of water was not over three & a half feet deep, & not susceptible of navigation by any vessels then engaged in trade & commerce; & that not less than thirteen feet of water is required for such purpose, & the depth required increasing nearly yearly, and that the city of Milwaukee now has dredging done in the Milwaukee River under a contract for not less than thirteen and a half feet of water for the

8 use and accommodation of the largest class of vessels that enter & pass along said river; & that they ignore & disregard the

three several acquittals of the said Peter Yates upon this identical question of obstruction of navigation and nuisance; that so far from the pretence of the place where the said wharf was erected being public and not private property, your orator charges that this identical property was, in 1858, and ever since has been, duly assessed & taxed by the city and county of Milwaukee as private property, for city, county, and State taxes, and ever since that time bid in by the city and county as such private property, and that they now hold (as your orator is informed & believes) all the certificates of sale thereof since that time, with the exception of the city taxes for the years 1858 & 1859, for the years & amounts as follows:

City taxes.

For the year 1859, the taxes for the preceding year having been inadvertently omitted & included in the year 1859,				$339 60
"	"	"	1860	$166 35
"	"	"	1861	$101 02
"	"	"	1862	$116 82
"	"	"	1863	$112 80

County and State taxes.

1859 (previous year included)	$161 08
1860	$103 71
1861	$ 63 75
1862	$104 34
1863	$ 59 78

Amounting, in the aggregate, with the 25 per cent. interest added, including the portion owned by said Shepardson of about fifty per cent. in extent & value, to the sum of about three thousand dollars; and that in respect of the said city taxes & tax certificates thereon for the years 1858 and 1859, the said Yates & Clark Shepardson, some time in April, 1864, purchased of the said city of Milwaukee the certifi-
9 cate of sale for [for] those years, and paid therefor to the treasurer of said city the amount of the taxes upon said property for those years, together with the interest thereon, amounting to a large sum, to wit, four hundred and fifty dollars, and thereupon the treasurer of said city assigned the said tax certificates to said Yates & Shepardson; and thereupon, afterwards, on the 23d day of May, 1864, Michael Bodden, treasurer of the said city of Milwaukee, by his deed of that date, for and in behalf and in the name of the said city of Milwaukee, and the State of Wisconsin, & under the seal of the said city, did "give, grant, and convey" the said premises to said Clark Shepardson and Peter Yates, by description as follows: "A piece of land lying easterly of the westerly forty (40) feet of lot No. one (1) in block No. one hundred & fifty-eight, (158,) between the northerly & southerly lines of block No. one hundred and fifty-eight extended, lying in section No. twenty-nine, (29,) in the Fourth ward of the city of Milwaukee," as by the said city tax deed, ready to be produced & proven as this honorable court shall direct, will more fully & at large appear, which said tax deed covers and includes the identical property in controversy, & has not been in any wise cancelled or annulled by the decision or decree of any court of record or other competent authority, but is still in full force and virtue; all which actings, doings, and pretences of the said defendants are contrary to equity and good conscience, & tend to the manifest wrong,

injury, & oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable, may it please your honors to grant to your orator not only the most gracious writ or writs of injunction, out of and under the seal of this honorable court, to be directed to the said City of Milwaukee and the said Alexander Miller, to restrain them and each of them, their servants, contractors, workmen, and agents from committing waste, spoil, destruction, or injury to the said dock or wharf property of your orator, or in any wise intermeddling therewith, until hearing or further order; but also the most gracious writ or writs of subpœna of the United States of America, to be directed to the said City of Milwaukee & the said Alexander Miller, thereby commanding them, & every of them, at a certain day & under a certain pain, therein to be specified, personally to be & appear before your honors in this honorable court, & then & there to answer all & singular the premises, and to stand to, perform, & abide such order & decree therein as to your honors shall seem meet: to the end, therefore, that the said defendants may, if they can, shew cause why your orator should not have the relief hereby prayed, & may, upon their several & respective corporal oaths, & according to the best & utmost of their several & respective knowledge, remembrance, information, & belief, full, true, direct, & perfect answer make to such of the several interrogatories hereinafter numbered & set forth, that is to say:

1. Whether your orator has not the possession & legal title to the premises first above-mentioned & described in this his bill of complaint?

2d. Whether the said Peter Yates did not drive spiles, erect a wharf, & fill in the same with sand and dirt to the extent mentioned in the year 1856, & at the cost & expense above-mentioned?

3d. Whether the said Peter Yates, at the September term (1856) of the circuit court of Milwaukee County, Wisconsin, was not indicted for driving said spiles & erecting said wharf, charging that he thereby caused an obstruction to the public navigation of the Milwaukee River, & therein charged him with being guilty of a common & public nuisance, & whether he was not duly tried upon said indictment & found not guilty by the jury & discharged therefrom?

4th. Whether a bill in equity was not duly filed in the name of the City of Milwaukee, as plaintiff or complainant, against the said Peter Yates & one Clark Shepardson, as defendants, by the duly elected attorney of said city, complaining of the erection of said dock or wharf as an obstruction to the public navigation of the Milwaukee River & as a common & public nuisance, & an injunction against the same prayed for; and whether or not, upon the affidavit of said Yates, denying said encroachment & nuisance, the said injunction prayed for was not overruled & denied?

5th. Whether or not, at the April term (1857) of the circuit court of Milwaukee County, the said Peter Yates was not again indicted for the same matters specified in the first indictment; whether he did not plead the first indictment, trial, verdict, and judgment in bar; whether the State did not demur to said plea; whether the said demurrer of the State was not overruled, & the said Peter Yates again acquitted and discharged from the matters contained in said last-mentioned indictment?

6th. Whether or not, at the July term (1863) of the municipal court of Milwaukee County, the said Peter Yates was not again indicted for the

same alleged obstruction and nuisance, or continuance of the same, & whether the said indictment & trial was not removed to the circuit court of said county, & whether the said Peter Yates did not plead the said two former indictments, trials, & acquittals in bar; whether the State, by its attorney, did not demur to said pleas; whether the said demurrers were not overruled and the State allowed to amend by taking issue upon the identity of the offence mentioned in said pleas, & whether the State did not do so, and upon the said issue upon the identity of the offences the said Peter Yates was not again found not guilty by the jury, & he acquitted & discharged by the court?

7th. Whether or not, on or about the 20th day of April, 1864, the common council of the city of Milwaukee did not pass a resolution of the tenor above set forth, & whether or not about the 1st day of October, 1864, the comtroller of said city, agreeably to said resolution, did
12 not advertise for proposals for removing said alleged obstructions & nuisance, as specified in the printed extract above annexed, & whether or not, pursuant to said proposals, the contract for doing the work therein specified, to wit, tear up, utterly demolish, & remove the said dock & wharf of your orator, was not duly let to the said Alexander Miller, & that, barring the interference of this honorable court, they threatened & would do so?

8th. Whether or not the said dock & wharf property of your orator is not valuable chiefly for the purposes above specified, and as valuable (allowing it to be lawful) as any in the City of Milwaukee of like character, & that if the said dock & wharf of this complainant was demolished, it would not amount to the total destruction of the value of said premises & be an irreparable injury to this complainant?

9th. Whether the said dock & wharf property above described, by any description whatever covering it, was not, from the year 1859, including the omission of the previous year, duly assessed & taxed as private property; whether or not the said city and the county of Milwaukee have not, since 1859, that year included, bid in the same for city, county, & State taxes, & for the amounts respectively above stated; whether or not the city of Milwaukee duly sold and assigned the certificate of sale for city taxes for the year 1859, including the omitted taxes of 1858, to the said Clark Shepardson & Peter Yates; & whether or not, on the 23d day of May, 1864, the treasurer of said city did not, under the seal of said city, duly stamped, witnessed, & acknowledged, give, grant, & convey by description, as last aforesaid, the same identical premises as private property & liable to taxation & sale as such to the said Clark Shepardson & Peter Yates, their heirs & assigns forever?

10th. Whether or not, on or about the 1st day of October, 1864, Ferd. Kuehn, comptroller of said city, did not advertise for sealed proposals to remove the said dock & wharf premises of your orator by the
13 10th day of Oct., 1864, & whether said Alexander Miller was not the sole bidder for the same; & whether or not, pursuant to said notice of letting said contract & said bid, the same was not duly let to the said Alexander Miller for the sum of two dollars & fifty cents per foot, lineal measure, for removing spiles and timber, and $1 10 per cubic yard for excavation, and a contract duly entered into by & between the said city of Milwaukee & the said Alexander Miller for the performance thereof; & whether or not the said Alexander Miller, under & by virtue of said contract, did not contemplate & threaten to perform the same; & whether or not the removal of said wharf would not amount to a total or nearly total destruction in value of said prem-

ises, and be an irreparable injury to the property of your orator therein?

And your orator, as in duty bound, will ever pray, &c.

PETER YATES,
Solicitor for Complainant.

MATT. H. CARPENTER, *of Counsel.*

THE STATE OF WISCONSIN, *Milwaukee County, ss:*

Peter Yates, of said county, being duly affirmed, says that Rynier V. Yates, the complainant, is not now within the State of Wisconsin, & that he is the agent and attorney of said Rynier V. Yates, the complainant, in this action, & was the owner of the property & real estate in the foregoing bill of complaint described, & the next immediate grantor of the complainant, and knows & is well acquainted with all the facts & circumstances in the foregoing complaint respectively averred, as the same transpired & took place. That all the material allegations in the foregoing complaint, and within the personal knowledge of him this deponent, as such grantor & attorney as aforesaid, & that the same are true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

PETER YATES.

14 Affirmed before me this 19th day of December, 1864.

WM. G. WHIPPLE,
U. S. Court Commissioner District of Wisconsin.

And same day (December 19th, 1864) came the complainant by his solicitor, Peter Yates, and entered in the order & rule book the following rule:

Rule for injunction.

U. S. circuit court, district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER Miller. } Peter Yates, comp't's sol'r.

On filing the bill of complaint in this cause, & on motion of Peter Yates, solicitor for complainant, it is ordered that the defendants shew cause before Hon. Andrew G. Miller, district judge, at his chambers in the city of Milwaukee, on Monday the 26th day of December, inst., at 10 o'clock a. m., why an injunction should not issue in said cause, according to the prayer of said bill.

Dated Dec. 19th, 1864.

PETER YATES,
Compl't's Sol'r.

Whereupon a subpœna issued as follows:

15 [50-cent stamp cancelled.]

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

[SEAL.] The President of the United States of America to the City of Milwaukee and Alexander Miller, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the dis-

trict of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of February next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by Rynier V. Yates.

And to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said "The city of Milwaukee" and Alexander Miller, if to be found in his district, and due return thereof make.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

PETER YATES, *Solicitor.*

It is ordered by our said court that the said "The city of Milwaukee" and Alexander Miller, the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that they show cause by Monday, the twenty-sixth day of December, at ten o'clock in the forenoon, why an injunction should not be issued, according to the prayer of the bill on file.

16 *Return.*

Subpœna returned:

Served on the within-named "The city of Milwaukee," by delivering to Abner Kirby, mayor of said city, a copy of this subpœna together with a copy of the bill of complaint in this cause, and served on the within-named Alexander Miller, by delivering to him personally a copy of this subpœna together with a copy of the bill of complaint in this cause, this 20th day of December, 1864.

Fees $5 04.

D. C. JACKSON, *Marshal,*
By W. S. JACKSON, *Deputy.*

Order denying injunction.

JANUARY 5TH, 1865.—This day came the parties, by their counsel, and the rule for a temporary injunction having been argued by counsel before the district judge in vacation, it is thereupon ordered that the said injunction be not granted.

And same day (January 5th, 1865) came the complainant, by his solicitor, and filed amendments to his bill of complaint as follows:

Amendments to bill.

In circuit court of U. S., district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER Miller.

} Amendments to the bill of complaint on file in this cause.

Upon the 5th page of said bill, after the conclusion of the statement

of the result of the third indictment, trial, & acquittal, & after the words "as this honorable court shall will more fully & at large appear," insert as follows: And your orator further states & shews, upon information & belief, that the said last-mentioned indictment was found upon the complaint before the grand jury, made by Ferdinand Kuehn, the comptroller of the said city of Milwaukee, as prosecutor in his official capacity as comptroller of said city, the municipal corporation named as defend-
17 ant in the bill of complaint on file; and that said indictment was drawn up & prosecuted in the said circuit court of Milwaukee County by the firm of Butler & Cottrill, esq'r's, counsellors-at-law, upon the special retainer & employment of the said City of Milwaukee, the municipal corporation named as defendant as aforesaid, and that S. Park Coon, esq'r., the district attorney of said county, & the representative of the State of Wisconsin in all prosecutions by indictment in said county, had nothing further to do with said last-mentioned indictment, & and the trial thereon, than to sign and endorse the said indictment & the demurrers & pleas therein with his official name; & that the said last-mentioned indictment & subsequent proceedings therein were in reality a prosecution by the said defendant, City of Milwaukee, in the name of the said State of Wisconsin.

Upon the 11th page of the bill of complaint on file, & between the prayer for injunction & the prayer for subpœnas, & after the words "or in any wise intermeddling therewith," insert the following:

"Or in instituting or maintaining in the name of the said city of Milwaukee, or the State of Wisconsin, any complaint, indictment, suit, or proceeding against your orator or his assigns, for, or on account of, the erection or continuance of said dock and wharf, premises of your orator above described, until hearing or further order; & that, upon the final hearing of said cause, that said injunction be decreed made perpetual; & that your orator may have such further relief, or may have such other relief as the nature of his case shall require, & as shall be agreeable to equity.

PETER YATES,
Solicitor for Complainant.

M. H. CARPENTER, *of Counsel.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

Peter Yates, of Milwaukee, in said district, being duly affirmed, says that having been the former owner of the property described in the bill on file, & well acquainted with all the facts therein stated, and
18 the complainant not so acquainted, and also not in this district, this affiant made oath to the truth of the matters in said bill set forth. This affiant further saith that the foregoing amendments to said bill are true, according to his best knowledge, information, and belief. That his information of the facts not within his personal knowledge was derived from Messrs. Butler & Cottrill and S. Park Coon, in the amendments named, & divers other persons.

This affiant further saith that he drew up said bill on file as complainant's solicitor, and that it did not then, nor until it was mentioned by his counsel, M. H. Carpenter, esq., on the application for a preliminary injunction, occur to him that the said bill presented a case for an injunction for suppressing oppressive and interminable litigation, and for the prevention of a multiplicity of suits, as well as irreparable mischief; that as to the two former, especially, the facts stated in the

foregoing amendments are material and important, and they are likewise true as above stated.

PETER YATES.

Subscribed & affirmed before me this 5th day of January, A. D. 1865.

WM. G. WHIPPLE,
U. S. Commissioner District of Wisconsin.

And same day (January 5th, 1865) came the complainant by his solicitor, and entered in the order & rule book the following rule:

Rule to show cause why amendments should not be made part of bill.

U. S. cir. court dist. Wis.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER.

On filing amendments to the bill of complaint on file in this cause, on motion of Peter Yates, solicitor for complainant, it is ordered
19 that the defendants shew cause, before Hon. Andrew G. Miller, judge of said district, at the city of Milwaukee, on the first Monday of February next, at 10 o'clock a. m. of said day, why the said amendments should not be incorporated into & taken & made a part of the said bill on file.

Dated January 5th, 1865.

PETER YATES,
Solicitor for Complainant.

JANUARY 28TH, 1865.—This day came the complainant, by his solicitor, and entered in the order & rule book the following rule:

Rule for injunction on amended bill.

Cir. court U. S, district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER.

On filing amendments to bill in this cause, on motion of Peter Yates, solicitor for complainant, it is ordered that the defendants shew cause before Hon. Andrew G. Miller, judge of said district, at his chambers, on the 1st Monday of February, 1865, at 10 o'clock a. m., why a preliminary injunction should not be granted in this cause upon the bill and amendments filed therein.

Dated January 28th, 1865.

PETER YATES,
Solicitor for Complainant.

MAY 16TH, 1865.—This day came the defendants, by James G. Jenkins, esq'r, their solicitor, and filed their answer and demurrer as follows:

Answer & demurrer.

Circuit court of the United States for the district of Wisconsin.

RYNIER V. YATES
vs.
20 THE CITY OF MILWAUKEE AND ALEXANDER MILLER. } In equity.

The joint demurrer of the defendants "The city of Milwaukee" and Alexander Miller to a part, and their joint and several answer to the residue of the amended bill of complaint of Rynier V. Yates, exhibited against the said defendants above named.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's amended bill to be true in such manner and form as the same are therein set forth and alleged, as to so much and such parts of the said amended bill as are set forth in the words following, that is to say—

"And your orator further states and shows, upon information and belief, that, at the September term of 1856 of the circuit court of Milwaukee County, the Peter Yates was indicted for having erected the said wharf, at said place, as an obstruction to the navigation of said Milwaukee River; that, at the same term of court, to wit, Oct. 8th, 1856, a bill in equity was filed in the same court by the said City of Milwaukee, as plaintiff, against the said Peter Yates and one Clark Shepardson, as defendants, in which the erecting of said wharf or dock was complained of as an obstruction to the public navigation, and an injunction against the same prayed for; that, on the same 8th day of Oct., 1856, the said Peter Yates appeared in said equity suit and filed his affidavit, denying all encroachment upon the navigable part of said river, setting forth the finding of said indictment for a nuisance, and declaring himself ready for trial thereon; and thereupon, Oct. 16th, 1856, the following order was entered in said suit, as by the records and proceedings of said court, ready to be produced and proven, as this honorable court shall direct, will more fully and at large appear: 'October 16th, 1856; and now, at this day, the court being well and suffi-
21 ciently advised of and concerning the application for the injunction heretofore made in this case, the same having heretofore been argued and submitted, it is considered and adjudged that said application be, and is hereby, overruled and denied;' and that said suit in equity has never been prosecuted further; that the said Peter Yates pleaded 'not guilty' to said indictment, and, at a subsequent term of said court, was duly tried and found not guilty by the jury, and acquitted and discharged of the said imputed offence, as by the records of said circuit court of Milwaukee County, ready to be produced and proven, as this honorable court shall direct, will more fully and at large appear."

"And your orator further states and shows, upon information and belief, that, at the April term (1857) of the same circuit court, he, the said Peter Yates, was again indicted for the same alleged obstruction and nuisance, to which last indictment he pleaded 'autrefois acquit;' to which plea the State of Wisconsin, by her attorney, demurred, and which demurrer was overruled by the court, and the said Peter Yates was again acquitted and discharged, and held to go without day from the said imputed offence, as by the records of said court, ready to be produced and proven, as this honorable court shall direct, and will more fully and at large appear."

"And your orator further states and shows to this honorable court, upon information & belief, that, at the July term (1863) of the municipal court of Milwaukee County, the said Peter Yates was again indicted for having erected and continued the said wharf, and that the same was an obstruction to the public navigation of the Milwaukee River, and a common and a public nuisance; that he was duly arrested upon a bench warrant issued by said court—arrested and brought in to answer, and plead to said last-mentioned indictment; that thereupon he made and filed an affidavit, agreeably to the statute in such cases made and
22 provided, for the removal of said indictment and the trial thereon to the circuit court of Milwaukee County."

"That an order for such purpose was accordingly entered in the said municipal court and the said indictment transmitted accordingly. That in said circuit court the said Peter Yates again pleaded autrefois acquit to the last-mentioned indictment. That the said State of Wisconsin, by her attorney, again demurred to the two pleas of autrefois acquit, pleaded by said Peter Yates, and the said Peter Yates joined in demurrer. That after argument of the same, the circuit court again overruled the said demurrer of the State and allowed the State to take issue upon the matters set forth in the said pleas, which the State did do by replying that the several erections and obstructions and the continuance of the same as set forth in the indictment, and the said several erections and obstructions and the continuance of the same as specified and set forth in said pleas, were not the same but other and different; that the said last-mentioned indictment was thereupon tried upon that issue, and the jury empannelled in said case again found the said Peter Yates 'not guilty,' and he was again acquitted and discharged, as by the record of said court, ready to be produced and proven, as this honorable court shall direct, and will more fully and at large appear."

"And your orator further states and shows, upon information and belief, that the said last-mentioned indictment was found upon the complaint before the grand jury made by Ferdinand Kuehn, the comptroller of the said city of Milwaukee, as prosecutor in his official capacity as comptroller of said city, the municipal corporation named as defendant in the bill of complaint on file; and that said indictment was drawn up and prosecuted in the said circuit court of Milwaukee County by the firm of Butler & Cottrill, esq'r's, counsellors-at-law, upon the spe-
23 cial retainer and employment of the said City of Milwaukee, the municipal corporation named as defendant as aforesaid, and that S. Park Coon, esq'r., the district attorney of said county, and the representative of the State of Wisconsin in all prosecutions by indictment in said county, had nothing further to do with said last-mentioned indictment and the trial thereon than to sign and endorse the said indictment and the demurrers and pleas therein with his official name; and that the said last-mentioned indictment and subsequent proceedings therein were in reality a prosecution by the said defendant, City of Milwaukee, in the name of the said State of Wisconsin."

"That, so far from the pretence of the place where the said wharf was erected being public and not private property, your orator charges that this identical property was, in 1858, and ever since has been, duly assessed and taxed by the city & county of Milwaukee as private property, for city, county, & State taxes, and ever since that time bid in by the city and county as such private property, and that they now hold (as your orator is informed and believes) all the certificates of sale thereof since that time, with the exception of the city taxes for the years 1858 and 1859, for the years and amounts as follows:

"*City taxes.*

"For the year 1859, (the taxes for the preceding year having been inadvertently omitted & included in the year 1859)..	$339 60
"For the year 1860	166 35
" " " 1861	101 02
" " " 1862	116 82
" " " 1863	112 80

"*County and State taxes.*

"1859 (previous year included)	$161 08
"1860	103 71
"1861	63 75
"1862	104 34
"1863	59 78

24 "Amounting in the aggregate, with the 25 per cent. interest added, including the portion owned by said Shepardson of about fifty per cent. in extent and value, to the sum of about three thousand dollars; and that, in respect of the said city taxes and tax certificates thereon for the years 1858 & 1859, the said Yates & Clark Shepardson, some time in April, 1864, purchased of the said City of Milwaukee the certificate of sale for those years and paid therefor to the city treasurer of said city the amount of taxes upon said property for those years, together with the interest thereon, amounting to a large sum, to wit, four hundred & fifty dollars, and thereupon the treasurer of said city assigned the said tax certificates to said Yates & Shepardson; and thereupon, afterwards, on the 23d day of May, 1864, Michael Bodden, treasurer of said city of Milwaukee, by his deed of that date, for and in behalf and in the name of the said city of Milwaukee and the State of Wisconsin, and under the seal of the said city, did 'give, grant, and convey' the said premises to said Clark Shepardson and Peter Yates, by description as follows: 'a piece of land lying easterly of the westerly forty (40) feet of lot No. one (1) in block No. one hundred & fifty-eight (158) between the northerly and southerly lines of block No. one hundred and fifty-eight extended, lying in section number twenty-nine (29) in the Fourth ward of the city of Milwaukee;' as by the said city tax deed, ready to be produced and proven, as this honorable court shall direct, will more fully and at large appear; which said tax deed covers and includes the identical property in controversy, and has not been in anywise cancelled or annulled by the decision or decree of any court of record or other competent authority, but is still in full force and virtue."

"And whether the said Peter Yates, at the September term (1856) of the circuit court of Milwaukee County, Wisconsin, was not indicted for driving said spiles and erecting said wharf, charging thereby that
25 he caused an obstruction to the public navigation of the Milwaukee River, and thereby charge him with being guilty of a common and public nuisance; and whether he was not duly tried upon said indictment and found not guilty by the jury, and discharged therefrom."

"And whether a bill in equity was not duly filed in the name of the City of Milwaukee, as plaintiff or complainant, against the said Peter Yates and one Clark Shepardson, as defendants, by the duly elected attorney of said city, complaining of the erection of said dock or wharf as an obstruction to the public navigation of the Milwaukee River, and

as a common and public nuisance, and an injunction against the same prayed for; and whether or not, upon the affidavit of said Yates, denying said encroachment and nuisance, the said injunction prayed for was not overruled and denied."

"And whether or not, at the April term (1857) of the circuit court of Milwaukee County, the said Peter Yates was not again indicted for the same matters specified in the first indictment; whether he did not plead the first indictment, trial, verdict, and judgment in bar; whether the State did not demur to said plea; whether the said demurrer of the State was not overruled, and the said Peter Yates again acquitted and discharged from the matters contained in said last mentioned indictment."

"And whether or not, at the July term (1863) of the municipal court of Milwaukee County, the said Peter Yates was not again indicted for the same alleged obstruction and nuisance, or the continuance of the same; and whether the said indictment and trial was not removed to the circuit court of said county, and whether the said Peter Yates did not plead the said two former indictments, trials, and acquitals in bar; whether the State, by its attorney, did not demur to said pleas;
26 whether the said demurrers were not overruled and the State allowed to amend by taking issue upon the identity of the offence mentioned in said pleas, and whether the State did not do so, and upon the issue upon the identity of the offences, the said Peter Yates was not again found not guilty by the jury and he acquitted and discharged by the court."

"And whether or not the said dock and wharf property above described, by any description whatever covering it, was not, from the year 1859, including the omission of the previous year, duly assessed and taxed as private property; whether or not the said city & the county of Milwaukee have not since 1859, that year included, bid in the same for city, county, and State taxes, and for the amounts respectively above stated; whether or not the City of Milwaukee duly sold and assigned the certificates of sale for the city taxes for the year 1859, including the omitted taxes of 1858, to the said Clark Shepardson and Peter Yates, and whether or not, on the 23rd day of May, 1864, the treasurer of said city did not, under the seal of the said city, duly stamped, witnessed, and acknowledged, give, grant, and convey, by description as last aforesaid, the same identical premises as private property, and liable to taxation and sale as such, to the said Clark Shepardson and Peter Yates, their heirs and assigns forever."

"And prays that the said defendants, and each of them, their servants, contractors, workmen, and agents may be enjoined from instituting or maintaining, in the name of the said City of Milwaukee or State of Wisconsin, any complaint, indictment, suit, or prosecution against your orator or his assigns, for or on account of the erection or continuance of said dock and wharf premises of your orator described, until hearing or further order."

And to which these defendants are in and by said amended bill required to make answer, they do demur, and, for cause of demurrer,
27 show that it appears by the said amended bill that the same is exhibited by the said complainant against these defendants to restrain them, and each of them, their servants, contractors, workmen, and agents, from committing waste, spoils, injury, and destruction or injury to the said dock or wharf in the said amended bill described, and from instituting or maintaining, in the name of the City of Milwaukee or the State of Wisconsin, any complaint, indictment, suit, or proceed

ing against the said complainant or his assigns, for or on account of the erection or continuance of the said dock or wharf, and that the said complainant hath not, in and by that part of the said amended bill of complaint herein set forth and demurred to, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against these defendants, and that those parts of the said amended bill of complaint be hence dismissed with their reasonable costs in this behalf sustained.

Answer.

And as to the residue of the said bill, these defendants, not waiving their said demurrer, but relying upon the same, and now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception which can or may be had to the many errors and insufficiencies in the residue of the complainant's said amended bill of complaint contained, for answer thereunto or unto so much and such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say—

That these defendants have no knowledge, remembrance, or information, save what is derived from the said amended bill of complaint, whether the said complainant had at the time of exhibiting his said amended bill of complaint the possession of the premises in
28 the said amended bill described. And the said defendants, upon their information and belief, deny that the said complainant then had or ever has had the actual possession of the said premises or any part thereof, or legal title thereto or to any part thereof.

And these defendants, further answering, say that they are informed and belief that the said Peter Yates did, in the summer and fall of 1856, drive piles and erect a wharf upon the west end of the said premises in the said amended bill described, a distance down the Menominee River of about one hundred and five feet, and thence down the Milwaukee River a like distance, and then drove piles about six feet apart on Point street, about twelve feet south of the north line of said Point street, and erected thereupon a wharf, composed of timber, four feet high, but these defendants have no knowledge, information, or belief whether each piece of such timber was about a foot square; and they admit that they are informed and believe that the said Peter Yates filled in the whole with sand and dirt, but they have no knowledge, information, or belief whether he did so at an expense exceeding two thousand dollars for dredging alone. These defendants admit that said Peter Yates did erect a wharf at the confluence of the Menomenee River with the Milwaukee River about one hundred and five feet square and about twelve feet of street, or what is in said amended bill called street, on the south side thereof; but these defendants deny that the said Peter Yates, at the time of the erection of the said wharf as in said amended bill alleged, or at any other time, was the owner of the said premises in the said amended bill of complaint described.

And these defendants further answering admit that, on the 20th day of April, 1864, the common council of the city of Millwaukee passed a joint resolution of the tenor and effect as set forth in said amended bill of complaint.

29 And these defendants further answering admit that the premises and wharf in the said amended bill of complaint described are the "obstruction" mentioned and described in the said resolution, and they distinctly and expressly deny each and every part of the alle-

gation in said amended bill contained, in the following words, viz: "And that the same is not an obstruction or nuisance now," and allege that, in 1856, when the said wharf was constructed, it was, and ever since has been and still is, an obstruction to the navigation of the Milwaukee and Menomenee Rivers, and was and is a public nuisance.

And these defendants further answering admit that, the said alleged obstructions not having been removed, Ferd. Kuehn, city comptroller, did give notice as required by said resolution for the letting of the contract, and had the same published as in said amended bill of complaint alleged, and that said notice is correctly set out in said bill of complaint.

And these defendants further answering admit that, agreeably to said notice, the contract therein, and in said joint resolution mentioned, was, on the 17th day of December, 1864, duly let to the said defendant Alexander Miller, and that the said Miller does now intend, unless prevented by some superior power, to immediately tear up and take out said wharf so far as the same is a public nuisance and an obstruction to the navigation of the said river, and so far as he is authorized, directed, and required to do by the said joint resolution and his said contract.

And these defendants further answering admit that the said dock or wharf in the said amended bill of complaint described has ever since the completion thereof been used for various purposes, but for what particular purpose or purposes, or to what extent the same has been used, these defendants have no knowledge, remembrance, or belief, nor at or for what sum or sums per annum the same was rented; and
30 these defendants deny that said premises are the most valuable for the purposes in said amended bill alleged of any property in the city of Millwaukee, and deny that the same are worth three hundred dollars per foot front, and over thirty thousand dollars in the aggregate; and these defendants admit that to tear up the dock and piles and dredge the same out, as proposed and intended by the said defendants, is utterly and totally to destroy the whole value thereof as a dock or wharf; but these defendants deny that the same is an irreparable injury to the rights of property of the said complainant; and the said defendants admit that they have pretended and claim, and still insist, that the place where the said wharf was erected was in the navigable portion of the Milwaukee River and of Lake Michigan, and that the said Millwaukee River, at the point where the said wharf or dock was erected and is situated, was, prior to the erection of the said dock or wharf, navigable water, formed conjointly of the waters of the Milwaukee and Menomenee Rivers and the waters of Lake Michigan, and that said Milwaukee River, at the point where the said wharf or dock was so constructed and erected as aforesaid, was an arm, estuary, and bay of Lake Michigan, and a part thereof at the time of the erection of the said dock or wharf, and ever theretofore had been an arm, estuary, bay, and part of said Lake Michigan, and that the grounds where the said wharf was erected, so far as the same were ever private or individual property, was dedicated by the original proprietors to the public for a public basin or enlargement of the navigable capacity of the river and the lake, and that said grounds were and are public and not private property, and the said wharf was and is an obstruction to the navigation of said lake and river and was and is a common and public nuisance.

And these defendants, further answering upon their information and belief, deny at the time and place where the said wharf was
31 erected, and more than one hundred feet further east into the Milwaukee River, the average depth of water was not over three and a half feet, and deny that it was not susceptible of navigation by

any vessel then engaged in trade and commerce; and, while they admit that thirteen feet depth of water would be very convenient for purposes of navigation, they deny that that depth of water is required for such purposes.

And these defendants, further answering to the first interrogatory in said amended bill contained, answer and say that, upon their information and belief, they deny that the said complainant had at the time of the filing of his said amended bill of complaint, or ever, the actual or rightful possession or the legal title to the said premises in the said bill first described.

And, to the second interrogatory of the said amended bill, these defendants answer and say that they admit that the said Peter Yates did drive piles, erect a wharf, and fill in the same with sand and earth to the extent hereinbefore in this answer stated and admitted, in the year 1856, but these defendants have no knowledge, remembrance, information, or belief as to the cost thereof or the expense laid out thereon.

And these defendants, in answer to the seventh interrogatory in the said amended bill of complaint, admit that the common council of the city of Milwaukee did, on the 20th day of April, 1864, pass a resolution of the tenor set forth in said amended bill, and that, on or about the 1st day of October, 1864, the comptroller of the city, agreeably to said resolution, did advertise for proposals for removing said alleged obstructions and nuisances as specified in the printed extract set forth in said amended bill, and that the contract for doing the work therein specified was duly let to the said defendant, Alexander Miller, and that, unless restrained by this honorable court, they intend to do so.

32 And these defendants, to the eighth interrogatory of said amended bill, answer and say that they admit that the said wharf is valuable chiefly for the purposes specified in the said amended bill of complaint, and that, allowing it to be lawful and private property, with good title, would be valuable; but they deny that said premises are as valuable for the purposes in said amended bill specified as any in the city of Milwaukee of the like character, and they admit that, if the said dock or wharf was demolished, it would amount to a total destruction of the value thereof; but they deny that such destruction would be an irreparable injury to the complainant.

And these defendants, further answering, allege and show to the court that the premises described in the said amended bill of complaint, and on which the said wharf was erected, are a part and parcel of lot or fraction number six (6) of section twenty-nine (29) in township number seven (7) north, of range number twenty-two (22) east; that, on or about the twenty-fourth day of June, A. D. 1837, said fraction six (6) was the property of Jonathan E. Arnold, Henry W. Cleveland, Onslow Peters, Cyrus Leland, Samuel H. Graves, Morgan L. Martin, Solomon Juneau, George Reed, Michael Dousman, Isaac R. Mooers, John H. Murphy, Hezekiah Cunningham, and Isaac R. Mooers and Alexander McDonald, executors of Isaac H. Alexander, deceased; that, so being the owners of the said lot, they did, on that day, execute, under their hands and seals, a plat of said lot six, upon which plot they laid out and designated the premises described in the said bill of complaint, and on which said dock or wharf was so erected as aforesaid, as a part and portion of the Milwaukee River, and did thereby dedicate the same to the public use as a highway by water; that, at that time, the said premises described in the said amended bill of complaint, and on which the said dock or wharf was erected, were a part of said river; that the depth of water

33 thereupon was six feet and upwards; and that said river at

the place aforesaid, to wit, at the premises mentioned in the said amended bill of complaint, and on which the said wharf was erected as aforesaid, was navigable for all such vessels and water craft as were then used in the navigation of said river and Lake Michigan, and that said premises, mentioned in said amended bill of complaint, and on which the said wharf was erected, after such platting and dedication as aforesaid, were in fact used and employed as a public highway.

And these defendants further answering show to the court that they are informed and believe, and allege that, after such platting and dedication by the owners aforesaid, the said Juneau, Martin, Reed, Graves, Dousman, Cleveland, Peters, and Leland, and one John S. Rockwell impleaded the said Arnold, Russell, Prentiss, Herman V. Prentiss, and others unknown, in a suit in the district court of the then Territory of Wisconsin for the said county of Milwaukee, for the partition of said lot six; that such proceedings were had in the said suit that, by the consent thereto had of the parties thereto, the plat aforesaid was adopted by the said court with the streets, alleys, and rivers, as hereinbefore stated, indicated and platted thereon, and dedicated as aforesaid, and partition of the said tract was adjudged and made by said court by parcelling out and dividing and alloting the lots in said plat, and into which said fraction six had been subdivided by said plat; that such division, partition, and allotment were made with reference to the streets, alleys, and rivers designated and marked on said plat, and the several owners took and owned their respective lots and parcels in said tract under said judgment with reference to all such streets, alleys, and rivers designated on said plat, and the same were and became thereby, and the said premises mentioned and described in the said bill of complaint,
34 and on which the said wharf was so as aforesaid erected, became thereby a public highway by water, and were dedicated to public use as such, and were in fact thereupon and thereafter, and from thence hitherto used and enjoyed by the public and by the several owners of lots or parcels in said fraction number six as a public highway by water, except in so far as such use has been obstructed by the erection aforesaid, and that the same has never at any time since been vacated or abandoned by the public as a highway as aforesaid.

And these defendants further answering show to the court that they are informed and believe that, after such partition of said lot or fraction number six, and the dedication of the premises in the said amended bill of complaint described, and on a portion of which the said wharf was so erected as aforesaid to the public use as a highway, and the actual use and enjoyment of the same as such highway, the said Peter Yates, in the said amended bill of complaint mentioned, wrongfully, and without any authority of law, entered upon a portion of the said public highway, being the premises described in the said amended bill of complaint, and on which the said wharf was erected as aforesaid, and obstructed the same as a public highway by driving piles and erecting thereon the dock or wharf in the said bill of complaint mentioned and described, and filling in the same and filling up the bed of the said river with sand, earth, and other materials, and occupied the same for private use, and thereby obstructed and hindered the public in passing and repassing with boats and vessels along and upon the same river and the part of Lake Michigan where the same was and is situated, and from passing to and from the said river and lake at the point where said premises are situated; and that such wrongful occupation and possession of the said premises is the same possession thereof by the said Peter Yates mentioned and set forth in said amended complaint. And these defendants show to the

35 court, and allege that neither the said Peter Yates, nor the said complainant has, nor has either of them, ever had any possession of the said premises in the said bill of complaint described, except the wrongful and unlawful occupation and possession thereof above set forth.

And these defendants further answering show to the court and allege that the whole, or nearly the whole portion of the river & lake, so as aforesaid filled up and obstructed by the said Peter Yates, still so remains so obstructed and useless as a public highway, and that it is still so wrongfully occupied and obstructed by the said complainant and the said Peter Yates, and that thereby the public generally, and all those engaged in the navigation of the said river and lake, are greatly hindered and obstructed in the use and enjoyment of the said river and lake as a public highway, and are totally hindered and obstructed in and prevented from using that portion thereof occupied by the said wharf mentioned in the said bill of complaint.

And these defendants deny all unlawful combination and confederacy in the said bill charged, without that any other matter or thing material or necessary for these defendants to make answer unto and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

THE CITY OF MILWAUKEE,
By FERD. KEUHN, *its Comptroller.*
ALEXANDER MILLER.

JAS. G. JENKINS,
Solicitor for Defendants.
H. L. PARMER, *of Counsel.*

I certify that in my opinion the foregoing demurrers to a part
36 of the amended bill of complaint is well founded in point of law.
Milwaukee, May 15th, 1865.

H. L. PALMER,
Of Counsel for Def't.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

On this 15th day of May, A. D. 1865, before me personally appeared Ferdinand Kuehn, and made oath that he is now, and for several years past has been, the comptroller of the city of Milwaukee, the municipal corporation named as defendant in the above answer; that, by means of his said office, he has acquired and possesses, as he verily believes, greater and more particular knowledge of the matter stated in said answer than any other officer of said corporation, inasmuch as said matters relate particularly to the sphere of duties of deponent as such comptroller.

And the said Ferdinand Kuehn and the said Alexander Miller severally appeared before me on said day, and severally made oath that he has heard read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the defendants, and that as to those matters he has been so informed and believes it to be true.

FRANCIS BLOODGOOD,
U. S. Circuit Court Com'r Dist. Wis.

Due service of copy admitted & verification as to demurrer waived. May 16th, 1865.

PETER YATES,
Sol'r for Comp't.

Replication.

MAY 30TH, 1865.—This day came the complainant, by his solicitor, and filed his replication as follows:

In circuit court U. S., district of Wisconsin.

RYNIER V. YATES
vs.
37 THE CITY OF MILWAUKEE & ALEXANDER MILLER.

The replication of Rynier V. Yates, complainant, to the answer of the City of Milwaukee & Alexander Miller, defendants.

This repliant, saving & reserving to himself all & all manner of advantage of exception which may be had & taken to the manifold errors, uncertainties, & insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth & will ever aver, & maintain, & prove his said amended bill to be true, certain, & sufficient in the law to be answered unto by the said defendants, & that the answer is very uncertain, evasive, & insufficient in the law to be replied unto by the repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto & herein & hereby well & sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters & things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, & humbly prays, as in and by his said amended bill he hath already prayed.

PETER YATES,
Compl't's Solicitor.

MATT. H. CARPENTER, *of Counsel.*

JUNE 5TH, 1865.—This day came the complainant, by his solicitor, and entered in the order and rule book the following rule:

Demurrer set down for argument.

Circuit court of the United States for the district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER. } In equity.—Of the first Monday of June, 1865.

38 On motion of Peter Yates, solicitor for complainant, ordered that the demurrer of the defendants to the amended bill in this cause be, & the same is hereby, set down for argument on the first Monday of July, A. D. 1865.

PETER YATES,
Sol'r for Compl't.

Hearing as to injunction.

JULY 12, 1865.—This day came the parties, by their counsel, and this cause came on to be heard upon the bill, answer, and demurrer, on motion for an injunction; and, not being concluded, the further hearing is adjourned until to-morrow morning.

JULY 13TH, 1865.—This day came the parties, by their counsel, and the argument of this cause was resumed; and, being concluded, the court took the same under advisement.

Injunction denied.

SEPTEMER 28, 1865.—This day, upon consideration of the motion for an injunction in this cause, it is ordered by the court that said motion be, and the same is hereby, overruled and denied.

Demurrer overruled, & order to answer.

SEPTEMBER 20TH, 1866.—This day came theparties, by their counsel, and this cause having been submitted on the demurrer at the April term (1865) of this court, and the court being fully advised in the premises, it is ordered by the court that the demurrer be, and the same hereby is, overruled. And it is further ordered that the defendants have leave to withdraw their present answer from the files, and that they file a new answer by the first Monday of November next.

DECEMBER 3, 1866.—This day came the complainant, by his solicitor, and entered in the order & rule book the following rule:

Rule setting cause down for hearing.

Circuit court of the United States, district of Wisconsin.

	RYNIER V. YATES *vs.* THE CITY OF MILWAUKEE & Alexander Miller.	In equity.—Of the first Monday of December, 1866.
39		

The defendants in the above-entitled cause not having availed themselves of the leave granted by the court to withdraw their present answer from the files, and file a new answer by the first Monday of November then next, on motion of Peter Yates, solicitor for complainant, it is ordered that this cause be set down for final hearing and decree on the first day of the next term of this court, to wit, on the first Monday of January, 1867, upon the bill of complaint, answer, and replication.

PETER YATES,
Complainant's Sol'r.

JANUARY 5, 1867.—This day came the defendants, by their solicitor, and filed amended answer as follows:

Amended answer.

Circuit court of the U. S. for the district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER.

The joint & several answer of the defendants, the City of Milwaukee & Alexander Miller, to the bill of complaint of Rynier V. Yates, complainant.

These defendants, now, & at all times hereafter, saving & reserving to themselves all manner of benefit & advantage of exception to the many errors & insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, they, each answering for himself, and not the one for the other, jointly & severally answer & say—

40 That these defendants have no knowledge, remembrance, or information, save what is derived from said amended bill of complaint, whether the said complainant had, at the time of exhibiting his said amended bill of complaint, the possession of the premises in the said amended bill described; & the said defendants, upon their information & belief, deny that the said complainant then had, or ever has had, the actual possession of the said premises, or any part thereof, or legal title thereto, or to any part thereof.

And these defendants, further answering, say that they are informed & believe that the said Peter Yates did, in the summer & fall of 1856, drive piles & erect a wharf upon the west end of the said premises in the said amended bill described, a distance down the Menomenee River of about one hundred & five feet, and thence down the Milwaukee River a like distance, & then drove piles about six feet apart on Point street, about twelve feet south of the north line of said Point street, & erected thereupon a wharf composed of timber four feet high, but these defendants have no knowledge, information, or belief whether each piece of said timber was about a foot square; & they admit that they are informed & believe that the said Peter Yates filled in the whole with sand & dirt, but they have no knowledge, information, or belief whether he did so at an expense exceeding two hundred dollars for dredging alone. The defendants admit that the said Peter Yates did erect a wharf at the confluence of the Menominee River with the Milwaukee River, about one hundred and five feet square, & about twelve feet of street, or what is in said amended bill called street, on the south side thereof; but these defendants deny that the said Peter Yates, at the time of the erection of the said wharf as in said amended bill alleged, or at any other time, was the owner of the said premises in the said amended bill of complaint described.

41 And these defendants, further answering, admit that on the twentieth day of April, 1864, the common council of the city of Milwaukee passed a joint resolution of the tenor & effect as set forth in said amended bill of complaint.

And these defendants, further answering, admit that the premises and wharf in the said amended bill of complaint described are the "obstruction" mentioned and described in the said resolution; & they distinctly and expressly deny each & every part of the allegation in

said amended bill contained in the following words, viz., "and that the same is not an obstruction or nuisance now," & allege that in 1856, when the said wharf was constructed, it was, and ever since has been, & still is, an obstruction to the navigation of the Milwaukee & Menomenee Rivers, & was and is a public nuisance.

And these defendants, further answering, admit that the said alleged obstructions not having been removed, Ferd. Kuehn, city comptroller, did give notice, as required by said resolution, for the letting of the contract, & had the same published as in said amended bill of complaint alleged, & that said notice is correctly set out in said bill of complaint.

And these defendants, further answering, admit that, agreeably to said notice, the contract therein, and in said joint resolution mentioned, was on the 17th day of December, 1864, duly let to the said defendant Alexander Miller, & that the said Miller does now intend, unless prevented by some superior power, to immediately tear up & take out said wharf, so far as the same is a public nuisance & an obstruction to the navigation of the said river, and so far as he is authorized, directed, and required to do by the said joint resolution & his said contract.

And these defendants, further answering, admit that the said dock or wharf, in the said amended bill of complaint described, has ever
42 since the completion thereof been used for various purposes, but for what particular purpose or purposes, or to what extent the same has been used these defendants have no knowledge, remembrance, or belief, nor at or for what sum or sums per annum the same was rented; & these defendants deny that said premises are the most valuable for the purposes in said amended bill alleged of any property in the city of Milwaukee, and deny that the same are worth three hundred dollars per foot front and over thirty thousand dollars in the aggregate; and these defendants admit that to tear up the dock & piles and dredge the same out, as proposed & intended by the said defendants, is utterly & totally to destroy the whole value thereof as a dock or wharf, but these defendants deny that the same is an irreparable injury to the right of property of the said complainant; and the said defendants admit that they have pretended and claim, & still insist, that the place where the said wharf was erected was in the navigable portion of the Milwaukee River & of Lake Michigan, & that the said Milwaukee River at the point where the said wharf or dock was erected & is situated was, prior to the erection of the said dock or wharf, navigable water formed conjointly of the waters of the Milwaukee & Menomenee Rivers & the waters of Lake Michigan, & that said Milwaukee Rivers, at the point where the said wharf or dock was so constructed & erected as aforesaid, was an arm, estuary, and bay of Lake Michigan & a part thereof at the time of the erection of the said dock or wharf, & ever theretofore had been an arm, estuary, bay, & part of said Lake Michigan; and that the grounds where the said wharf was erected, so far as the same were ever private or individual property, was dedicated by the original proprietors to the public for a public basin or enlargement of the navigable capacity of the river & the lake, & that said grounds were & are
43 public & not private property, & the said wharf was and is an obstruction to the navigation of said lake & river, & was & is a common & public nuisance. And these defendants, further answering upon their information & belief, deny at the time & place where the said wharf was erected, & more than one hundred feet further east into the Milwaukee River, the average depth of water was not over three & a half feet & deny that it was not susceptible of navigation by any vessel then engaged in trade and commerce; and while they admit that thir-

teen feet depth of water would be very convenient for purposes of navigation, they deny that that depth of water is required for such purpose.

And the said defendants, further answering, upon their information & belief, deny that the said identical property in the said bill of complaint described, was in 1858 & ever since has been duly assessed & taxed by the city & county of Milwaukee as private property for city, county, & State taxes, or that ever since that time bid in by the city & county as such private property or that they now all the certificates of sale thereof since that time, with the exception of the city taxes for the years 1858 & 1859.

And these defendants, further answering, show that they are informed and believe, and upon their information & belief allege, that all the taxes set forth in the said bill of complaint were levied & assessed, not upon the premises in the said bill of complaint described, but upon a tract of land sixty-five feet in width from east to west & one hundred feet long from north to south, lying west of the dock line as the same was in 1856 & runs easterly of the west forty feet of said lot No. one in said block number one hundred & fifty-eight, & that the tract of land described in the said tax certificate for the year 1858 & 1859, so purchased by the said Peter Yates & Clark Shepardson in 1864, and the said tract of land described in the said tax deed from Michael
44 Bodden to the said Clark Shepardson & Peter Yates set forth in the said bill of complaint, was the same tract of land above described & is in said deed described as set forth in said bill of complaint, & that said tax deed does not cover & include the identical property in controversy in this cause & described in said bill of complaint, nor any part of it.

And these defendants, further answering, to the first interrogatory in said amended bill of complaint, answer & say that upon their information & belief they deny that the said complainant had, at the time of the filing of his said amended bill of complaint, or ever, the actual or rightful possession, or the legal title to, the said premises in the said bill first described.

And to the second interrogatory of the said amended bill these defendants answer & say that they admit that the said Peter Yates did drive piles, erect a wharf, & fill in the same with sand and earth to the extent hereinbefore in this answer stated & admitted in the year 1856; but these defendants have no knowledge, remembrance, information, or belief as to the cost thereof, or the expense laid out theron.

And these defendants, in answer to the seventh interrogatory in the said amended bill of complaint, admit that the common council of the city of Milwaukee did, on the 20th day of April, 1864, pass a resolution of the tenor set forth in said amended bill; and that on or about the first day of October, 1864, the comptroller of the city, agreeably to said resolution, did advertise for proposals for removing said alleged obstructions & nuisances as specified in the printed extract set forth in said amended bill, and that the contract for doing the work therein specified was duly let to the said defendant Alexander Miller, & that unless restrained by this honorable court they intend to do so.

And these defendants to the 8th interrogatory of the said amended bill answer and say that they admit that said wharf is valuable chiefly for the purpose specified in the said amended bill of complaint,
45 & that allowing it to be lawful & private property with good title would be valuable, but they deny that said premises are as valuable for the purposes in said amended bill specified as any in the city of Milwaukee of the like character, and they admit that if the said

dock or wharf was demolished, it would amount to the total destruction of the value thereof, but they deny that such destruction would be an irreparable injury to the complainant.

And these defendants, to the 9th interrogatory of the said amended bill of complaint, answer & say, upon their information & belief, they deny that the said dock & wharf property above described, by any description whatever covering it, was from the year 1859, including the omission of the previous year, duly assessed & taxed as private property, & the said defendants further answering the said ninth interrogatory, upon their information & belief, deny that the said city & the county of Milwaukee have since 1859, that year included, bid in the same for city, county, & State taxes, & for the amount in that behalf stated in the said bill, but that the premises assessed for the taxes in said amended bill, set forth & covered by the tax certificates & tax deed in said amended bill of complaint mentioned, were the premises hereinbefore in this answer described as a tract of land, sixty-five feet in width from east to west, & one hundred feet long from north to south, lying west of the dock line, as the same was in 1856, & east of the west forty feet of said lot number one in said block No. 158, & that said assessment, tax certificates, & tax deed did not cover or include the said dock property described in the said amended bill of complaint & in controversy in this cause, nor any part of it.

And these defendants, further answering, allege & show to the court that the premises described in the said amended bill of complaint,
46 & on which the said wharf was erected, are a part & parcel of lot or fraction number six (6) of section twenty-nine (29) in township number seven (7) north, of range twenty-two (22) east; that on or about the 24th day of June, A. D. 1837, said fraction six (6) was the property of Jonathan E. Arnold, Henry W. Cleveland, Onslow Peters, Cyrus Leland, Samuel H. Graves, Morgan L. Martin, Solomon Juneau, George Reed, Michael Dousman, Isaac R. Mooers, John A. Murphy, Hezekiah Cunningham, & Isaac R. Mooers, & Alexander McDonald, executors of Isaac H. Alexander, deceased; that, so being the owners of the said lot, they did on that day execute under their hands & seals a plat of said lot six, upon which plot they laid out & designated the premises described in the said bill of complaint, & on which said dock or wharf was so erected as aforesaid, as a part & portion of the Milwaukee River, & did thereby dedicate the same to the public as a highway by water. That at that time the said premises described in the said amended bill of complaint, and on which the said dock or wharf was erected, were a part of said river; that the depth of water thereupon was six feet & upwards, and that said river at the place aforesaid, to wit, at the premises mentioned in the said amended bill of complaint, & on which the said wharf was erected as aforesaid, was navigable for all such vessels & water craft as were then used in the navigation of said river & Lake Michigan; & that said premises mentioned in said amended bill of complaint, & on which the said wharf was erected after such platting & dedication as aforesaid, were, in fact, used & enjoyed as a public highway.

And these defendants, further answering, show to the court that they are informed & believe & allege that after such platting & dedica-
47 tion, by the owners aforesaid, the said Juneau, Martin, Reed, Graves, Dousman, Cleveland, Peters, & Leland, & one John S. Rockwell, impleaded the said Arnold, Russell, Prentiss, Herman V. Prentiss, & others unknown, in a suit in the district court of the then Territory of Wisconsin, for the said county of Milwaukee, for the parti-

tion of the said lot six; that such proceedings were had in the said suit that, by the consent thereto had of the parties thereto, the plat aforesaid was adopted by the said court, with the streets, alleys, & rivers, as hereinbefore stated, indicated, & platted therein & dedicated as aforesaid, & partition of the said tract was adjudged & made by said court, by parcelling out & dividing & alloting the lots in said plat, & into which said fraction six had been subdivided by said plat; that such division, partition, & allotment were made with reference to the streets, alleys, & rivers designated & marked on said plat, and the several owners took & owned their respective lots & parcels in said tract under said judgment, with reference to all such streets, alleys, & rivers designated in said plat, & the same were & became thereby, & the said premises mentioned & described in the said bill of complaint & on which the said wharf was so as aforesaid erected became thereby, a public highway by water, & were dedicated to public use as such, and were in fact thereupon, & thereafter & from thence hitherto used & enjoyed by the public & by the several owners of lots or parcels in said fraction number six, as a public highway by water, except in so far as such use has been obstructed by the erection aforesaid, & that the same has never at any time since been vacated or abandoned by the public as a highway as aforesaid.

And these defendants, further answering, show to the court that they are informed & believe that after such partition of said lot or
48 fraction number six, & the dedication of the premises in the said amended bill of complaint described, & on a portion of which the said wharf was so erected as aforesaid, to the public use as a highway, & the actual use & enjoyment of the same as such highway, the said Peter Yates, in the said amended bill of complaint mentioned, wrongfully & without any authority of law, entered upon a portion of the said public highway, being the premises described in the said amended bill of complaint, & on which the said wharf was erected as aforesaid, & obstructed the same as a public highway by driving piles & erecting thereon the dock or wharf in the said bill of complaint mentioned & described, & filling in the same & filling up the bed of the said river with sand, earth, & other materials, & occupied the same for private use, & thereby obstructed & hindered the public from passing & repassing with boats & vessels, along & upon the said river and the part of Lake Michigan where the same was and is situated, & from passing to & from the said river & lake at the point where said premises are situated, & that such wrongful occupation & possession of the said premises is the same possession thereof, by the said Peter Yates, mentioned & set forth in said amended complaint. And these defendants show to the court & allege that neither the said Peter Yates nor the said complainant has, nor has either of them ever had, any possession of the said premises in the said bill of complaint described, except the wrongful & unlawful occupation & possession thereof now set forth.

And these defendants further answering show to the court and allege that the whole, or nearly the whole, portion of the river & lake, so as aforesaid filled up and obstructed by the said Peter Yates, still remains so obstructed & useless as a public highway, & that it is still so wrongfully occupied & obstructed by the said complainant & the said
49 Peter Yates, & that thereby the public generally, and all those engaged in the navigation of the said river & lake, are greatly hindered & obstructed in the use & enjoyment of the said river & lake as a public highway, & are totally hindered & obstructed in and prevented from using that portion thereof occupied by the said wharf men-

tioned in the said bill of complaint. And these defendants deny all unlawful combination & confederacy in the said bill charged, without that any other matter or thing material or necessary for these defendants to make answer unto & not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants, all which matters & things these defendants are ready to aver, maintain, & prove, as this honorable court shall direct; & humbly pray to be hence dismissed with their reasonable costs & charges in this behalf most wrongfully sustained.

THE CITY OF MILWAUKEE,
By JAS. G. JENKINS, *City Att'y.*

JAS. G. JENKINS, *Sol'r for Def'ts.*
H. L. PALMER, *of Counsel for Defendants.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

On the 5th day of January, A. D. 1867, before me personally appeared James G. Jenkins, and made oath that he is now, & for several years past has been, the city attorney of the city of Milwaukee, the municipal corporation named as defendant in the above answer; that by means of said office he has acquired and professes he verily believes greater & more particular knowledge of the matters stated in said answer than any other officer of said corporation. And the said James G. Jenkins appeared before me on said day & made oath that he has read the above answer subscribed by him, and knows the contents thereof, and
50 that the same is true of his own knowledge, except as to the matters which are therein stated to be on information & belief of the defendants, & that as to those matters he has been so informed & believes it to be true.

JAMES McFARLIN,
U. S. Commissioner Dist. of Wis.

FEBRUARY 4TH, 1867.—This day came the complainant, by his counsel, and filed affidavit of Peter Yates, and upon the filing thereof entered a rule that the defendants show cause by the first Monday of March next, why the answer filed on the 5th day of January, 1867, should not be stricken from the files for irregularity, with costs, which affidavit is as follows:

Affidavit of Peter Yates.

Circuit court of the United States, district of Wisconsin.

RYNIER V. YATES, COMPLAINANT,
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER,
defendants.

DISTRICT OF WISCONSIN, *Milwaukee County, ss:*

Peter Yates, of said district & county, being duly affirmed, deposes and says that on the 19th day of December, 1864, a bill in equity in the above-entitled cause was filed in said court, praying for an injunction & subpœna to answer the same, which was served on the defendants on the next day, and at the same time an order entered that the defendants show cause on Monday the 26th day of December, 1864, why an injunction should not issue according to the prayer of the bill on file. That

the said bill was subseqently amended. That on the 16th day of May, 1865, the said defendants filed a demurrer to part and answer to part of said bill. That an order was subsequently duly entered by deponent as complainant's solicitor, on his renewed application for a preliminary injunction and hearing upon the demurrer to part of said bill for
51 the then next ensuing term (1865) of said court, and the said cause was then brought to a hearing thereon and argued by the counsel for both parties.

Deponent further says that on the 20th day of September, 1866, the following order in this cause was entered by the direction of the judge of said court:

"This day came the parties, by their counsel, and this cause having been submitted on the demurrer at the April term (1865) of this court, and the court being fully advised in the premises, it is ordered by the court that the demurrer be, and the same hereby is, overruled; and it is further ordered that the defendants have leave to withdraw their present answer from the files, and that they file a new answer by the first Monday of November next."

And this deponent further says that the said defendants having neglected to withdraw their answer to part of said bill and file a new answer thereto by the first Monday of November then next, according to the leave granted by the court upon overruling said demurrer, and no new answer having been filed on or before the first Monday of December, 1866, on said last-named day the following order was duly entered in the book of common rules in said cause, to wit:

"Circuit court of the United States, district of Wisconsin.—Of the first Monday of December, 1866.

"RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER.

"The defendants in the above-entitled cause, not having availed themselves of the leave granted by the court to withdraw their present answer from the files, and file a new answer by the first Monday of November then next, on motion of Peter Yates, solicitor for complainant, it is hereby ordered that this cause be set down for final hearing and decree on the first Monday of the next term of this court, to wit, on the first Monday of January, 1867, upon the bill of complaint, answer, &
52 replication.

"PETER YATES, *Complainant's Sol'r.*"

And this deponent further says that on the 5th day of January, 1867, being the Saturday preceding the first Monday of January, 1867, the last-named time being a regular term of said court, without any affidavit of merits; without any affidavit excusing the laches of said defendants; without any order to show cause or notice to complainant's solicitor; and without previous or cotemporary notice or service of copy of amended answer in said cause; and without any order or authority of the said court, or any judge thereof, or other authority whatsoever, the said defendants' solicitor filed in the office of the clerk of said court an "amended answer" in said cause.

And this deponent further says that the before-mentioned rule entered by this deponent, as complainant's solicitor, on the first Monday of December, 1866, setting this cause down for final hearing & decree as afore-

said, is the last rule or order entered by either party, or the court, in this cause.

PETER YATES.

Affirmed before me this 4th day of February, 1867.
JAMES McFARLIN,
U. S. Commissioner Dist. of Wis.

Order denying motion to strike am'd answer from the files.

MARCH 12, 1867.—On hearing the motion to strike amended answer from the files, it is ordered by the district judge that said motion be denied.

And came the complainant and filed his replication to amended answer as follows:

Replication to answer.

In circuit court of U. S., district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER.

53 The replication of Rynier V. Yates, complainant, to the "amended answer" on file in this cause.

This repliant, excepting to the order & decision of the district judge overruling the motion of complainant to strike the said "amended answer" from the files of this court, and not waiving, but expressly saving & reserving to himself, all and all manner of advantage of exception which may be had & taken to the manifold errors, uncertainties, & insufficiencies of the said amended answer, for replication thereunto saith that he doth & ever will maintain & prove his said amended bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, & that the said "amended answer" is very uncertain, evasive, & insufficient in the law to be replied unto by the repliant; without that, that any other matter or thing in the said "amended answer" contained material or effectual in the law to be replied unto, & herein & hereby well & sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters & things, this repliant is ready to aver, maintain, & prove as this honorable court shall direct; & humbly prays as in & by his said amended bill he hath already prayed.

PETER YATES, *Comp't's Solicitor.*
MATT. H. CARPENTER, *of Counsel.*

I admit service of copy of the foregoing replication March 12th, 1867.
JAS. G. JENKINS,
Sol'r for Def'ts.

APRIL 18, 1867.—Depositions received from Wm. G. Whipple, esq., and filed.

Rule setting cause down for hearing.

AUGUST 5, 1867.—"Three months and over having elapsed since this cause was at issue, on motion of Peter Yates, solicitor for complainant,

it is ordered that this cause be, and is hereby, set down for final hearing and decree upon the pleadings, proofs, and exhibits on file therein,
54 on the first day of the next term of this court to be held at the city of Milwaukee on the second Monday of September, 1867."

OCTOBER 7, 1867.—This day came the parties by their counsel, and by consent it is ordered by the court that the time for taking testimony in this cause be extended to the fifteenth day of November next.

Cause set down for hearing.

DECEMBER 2, 1867.—"On motion of D. G. Hooker, def'ts' sol'r, ordered that this cause be, & the same is, set down for hearing upon bill, answer, replication, & proofs."

JANUARY 4, 1868.—Depositions with Exhibits "A" to "M," inclusive, received from William G. Whipple, U. S. comm'r, and filed.

Cause submitted on stip'n.

JANUARY 7, 1868.—This day came the parties by their counsel, and submitted this cause as per their stipulation herein filed this day as follows:

Stipulation submitting cause.

Circuit court United States, district of Wisconsin.—In equity.

R. V. YATES.
vs.
CITY OF MILWAUKEE ET ALS.

The parties stipulate that this cause be this day submitted on pleadings & proof, to be heard before the district judge at chambers in Milwaukee, & when decided the decree to be entered of record as of this term. Either party may, within fifteen days, offer any further proof, documentary or other proofs, which would be proper to offer at the hearing. All decisions, rulings, & orders made by the judge to be considered as made in court, both parties saving all right to object & except as they might do on hearing in court.

Jan'y 7, 1868.

PETER YATES, *Sol.*,
By M. H. CARPENTER,
Counsel for Complainant.
D. G. HOOKER, *Def'ts' Sol'r.*

55 FEB'Y 28, 1868.—The counsel appeared in pursuance of this stipulation; and ordered that the hearing is to commence on the first Monday of April next, at 10 o'clock a. m.

A. G. MILLER, *Judge.*

Rule setting cause for hearing.

AUGUST 3, 1868.—"On motion of Peter Yates, solicitor for complainant, it is ordered that this cause be set down for hearing upon the pleadings, proofs, & exhibits at the next term of this court, commencing on the second Monday of September, A. D. 1868."

And now at this same term, to wit, September term, A. D. 1868, and on the thirteenth day thereof, to wit, on the twenty-eighth day of September, A. D. 1868—present, the Honorable David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, presiding, and the Honorable Andrew G. Miller, district judge—the following proceedings were had, to wit:

Hearing.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER. } In equity.

This day this cause came on to be heard upon the pleadings and proofs, Mr. Peter Yates appearing for the complainant, and Mr. Hooker, for the defendants; and the hearing not being concluded the same was adjourned until to-morrow morning.

SEPTEMBER 29TH, 1868.—Present, the Honorable David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, presiding, and the Honorable Andrew G. Miller, district judge; the following proceedings were had, to wit:

Hearing concluded.

This day came the parties, by their counsel, and the hearing of this cause was resumed, and being concluded the court took the same under advisement.

56 And at the hearing of said cause the following testimony was read in evidence:

Complainant's testimony.

Circuit court U. S., district of Wisconsin.

RYNIER V. YATES, COMPLAINANT,
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER, defendants. } Order.

The solicitor for the complainant in the above-entitled cause having given notice to the solicitor of the defendants that he desires the evidence to be adduced in this cause to be taken orally before me at my office in Young's block, city of Milwaukee, on Wednesday, the third day of April next, at 10 o'clock a. m. of said day, it is therefore and thereupon hereby ordered that said time & place is hereby fixed by me for adducing evidence in this cause.

Dated March 22d, 1867.

WM. G. WHIPPLE,
U. S. Circuit Court Commissioner District of Wisconsin.

Service of copy of foregoing admitted March 22d, 1867.

JAS. G. JENKINS,
Sol'r for Def'ts.

Circuit court U. S., district of Wisconsin.

RYNIER V. YATES, COMPLAINANT,
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER,
defendants.

SIR: Please take notice that the complainant in this cause desires the evidence therein to be taken orally before William G. Whipple, esq'r, U. S. court commissioner, at his office in Young's block, city of Milwaukee, on Wednesday, the 3d day of April next, at 10 o'clock a. m. of said day, being the time and place fixed by him by order for that purpose, a copy of which is herewith served upon you.

Dated March 22d, 1867.

57 Yours, &c.,

PETER YATES,
Solictor for Complainant.

JAMES G. JENKINS, Esq'r, *Deft's' Sol'r.*

Service of copy of foregoing admitted March 22d, 1867.

JAS. G. JENKINS,
Sol'r for Def't.

United States circuit court, district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER.

Depositions taken on the part of the complainant, pursuant to the order and notice hereto annexed, on the 3d, 4th, & 5th of April, 1867.

Deposition of William S. Trowbridge.

William S. Trowbridge, being first duly sworn, deposed and said:

I am fifty-three years old; I have resided in the county of Milwaukee and State of Wisconsin nearly thirty years. I am the present county surveyor of said county. I was city surveyor five years. While I was in office as city surveyor soundings were taken from the mouth of the Milwaukee River up to Chestnut st. bridge, for the purpose of estimating the amount of dredging to be done in said river; this was in 1853 or 1854. The original maps of said soundings, which were deposited in the city surveyor & city clerk's offices, were burned up subsequently, with the building in which said offices were, as this witness is informed and verily believes.

Before said maps were destroyed I made a plat of the property, grounds, & rivers adjacent to lot one, block one hundred & fifty-eight, (158,) Fifth ward, and a true plat of the soundings in front of those premises. The plat now presented to me, and signed "W. S. Trowbridge—Attest: D. E. Cameron, court commissioner," I recognize as the one made by me & above described. The soundings are marked by feet and tenths
8 of a foot, as, for example, at the east end of the line on the south side of the Menomenee River it is put down "0.8," (aught eight,) meaning "$\frac{8}{10}$" (eight-tenths) of a foot, and the next sounding east thereof "1. 0," (one aught,) meaning one foot. The round aughts (0 0) indicate the spiles driven at the time the map was made, which was in 1864. The semi-circular dotted line commencing at the end of the line above mentioned, running south-

eastward denotes grass growing in the water; said line is drawn in a similar manner to the following, viz: . All the grounds embraced within those marks is designed to be represented as marsh and grass growing therein as above stated. The distance between the lines of the soundings running east are twenty-five (25) feet; and the soundings are taken ten (10) feet from each other on those lines. The map above described is a true representation of the situation of the rivers described therein and the property adjacent thereto. The semi-circular line beginning at the northeast corner of lot one, (1,) block one hundred and fifty-eight, (158,) running thence southeast, south, and southwesterly, is the line represented upon the original plats representing the division between dry and wet land. In 1854, when this map was made, the distance on the north dock line of block 158 extended in a southeasterly direction; said distance, being taken from the northeast corner of said lot one (1) to navigable waters in the Milwaukee River, is some three hundred feet, (300.) The distance to navigable waters as just described was the same in 1856. I should call navigable water the depth of eight or nine or ten (8 or 9 or 10) feet, which was sufficient to float vessels commonly in use at that time. The depth of water required to navigate loaded vessels has been constantly increasing since that time. This map is the identical map referred to by me in my testimony in the case of Walker against Shepardson, reported in volume four (4) of
59 Wisconsin Reports, page 486. Before any dredging was done the head of navigation for loaded vessels was at the yellow warehouse indicated on said map; and the channel of the river at that time, and at that point was on the east side of the river. No part of the meander line on Milwaukee River is east of Reed street; I mean no part of it where it crosses block 158. Reed street before filled in was of the same character as the marsh southeast of said block 158.

WILLIAM S. TROWBRIDGE.

Deposition of James S. White.

James S. White, being duly sworn, deposes and says:

I am deputy city treasurer of the city of Milwaukee; deputy for the last two years, and for the two years previous clerk in the city treasurer's office. I am acquainted with all the lands described upon the maps of the said city sufficiently to find the several tracts upon the tax list.

The said city, by Michael Bodden, its treasurer, executed & delivered the deed exhibited to me, and marked Exhibit "A," at the time of the date thereof, and for the property therein described. The same identical property has ever since been assessed and sold by the said city, by the same identical description, with the exception that after the word "extended" in said description were added the words "to Milwaukee River," except for the year 1860, which was as stated in said deed. Said premises were assessed & sold and bid in by said city for years & taxes as follows:

For the year 1859, three hundred & thirty-nine dollars & sixty-nine cents.

For 1860	$166 35
For 1861	$101 62
" 1862	$115 72

" 1863		$112 95
" 1864		$118 54
" 1865, bounty tax		$ 62 14
" "		$ 31 47
60 " 1866		$ 42 74

The taxes levied upon lots one & two, (1 & 2,) block one hundred & fifty-eight, (158,) for the same period, are as follows:

For 1859, lot one	$33 95
" " " two	$33 95
" 1860, lot one	$33 25
" " " two	$33 25
" 1861, " one	$28 80
" " " two	$28 80
" 1862, " one	$32 80
" " " two	$32 80
" 1863, " one	$32 00
" " " two	$32 00
" 1864, " one	$33 80
" " " two	$33 80
" 1865, " one	$30 60
" " " two	$30 60
" " " one, bounty tax	$17 60
" " " two " "	$17 60
" 1866, " one	$41 60
" " " two	$41 60

The said sum of three hundred thirty nine dollars & sixty-nine cents, together with the interest thereon at seven per cent., & costs and charges, was duly paid into the city treasurer by said Shepardson & Yates at the time of the purchase of the tax certificate from said city, and which said sum has never been refunded to said Shepardson & Yates, or either of them, or to any other person for their use, to the knowledge of this witness. The printed book herewith exhibited to me, entitled "The charter and ordinances of the city of Milwaukee," and purporting to be published in said city December 5, 1856, has been uniformly taken as a true copy of the charter, amendments thereto, and ordinances of said city up to that time—Dec. 5, 1856. Both by the ordinance passed May 5th, 1853, and by that passed June 8th, 1855, as published therein, the dock-line front of block 158 commences at the north-
east corner thereof; the first dock line representing it to be 142
61 feet east of Reed street, and the latter 140 feet east of said street, that being the only difference between the two. I am acquainted with the location of the "Peter Yates dock," so called, being a piece of land lying easterly of the westerly forty feet of lot number one, (1,) block 158, between the northerly and southerly lines of block 158, extended to the Milwaukee River; the same includes all the land or premises between the line first given and the Milwaukee River. In my opinion the words after the word "extended" "to the Milwaukee River" do not enlarge the description of the property contained in the deed; but all lands lying easterly of the westerly forty (40) feet are embraced therein.

JAMES S. WHITE.

Deposition of P. Yates.

Peter Yates, having first been duly affirmed as a witness, deposes and

says that he is the next immediate grantor of the complainant, his brother & solicitor in this suit; that he has resided in the city of Milwaukee over 26 years, & built the wharf or dock mentioned in the amended bill & amended answer in the year 1836. That on the 22d day of May, 1856, for the consideration of $25,000, he purchased of Clark Shepardson the property specified in the bill of complaint in this cause, upon the west end of which the wharf was erected, by deed bearing that date, duly executed & acknowledged by said Shepardson & wife, & recorded May 27, 1856, in vol. 52 of Deeds, on pages 334 & 335, in the register's office of Milwaukee County. That said wharf was fully completed, except filling in, on the 16th day of October, 1856, & that the same has never since been extended or enlarged. That on the next day, to wit, October 17, 1856, before any dredging had been done in that vicinity, witness provided a small flat-boat and a piece of board about 5½ ft. long, marked off into feet & inches, and a cord over 100 feet long, divided by knots 10 ft. apart thereon, and called upon the following
62 named persons to assist him in taking soundings upon the lines of said wharf, and ten feet distant therefrom upon the Menomonee River, and 50 feet & 100 feet distance therefrom upon the Milwaukee River, & likewise the distance from the northeast corner of said wharf to Dousman's dock upon the opposite side of the river, and from the center of the wharf to the west point of the Walker's Point bridge, to wit: Benjamin Bagnall, John P. Willard, James McIntyre, William McCullam, John Thorsen, Jno. Wells, jr., Stephen Batchelder, Jacob Nunnemacher, & John Hilton. Before commencing the soundings, witness drew a diagram representing said wharf, while 3 or 4 of the persons above named took the measured board & reported the depth of water on the line of said wharf by actual measurement; witness entered the same upon said diagram in inches of depth of water. Thereafter three of them entered into the skiff provided for the purpose, with one of the cord in hand while the others were standing upon the timbers of the wharf, one having the other end of the cord & reporting 50 or 100 ft. distant, as the case might be; and witness would write down the various depths as reported at the several distances specified. That diagram is now here produced, precisely as then made, & hereto annexed & marked Exhibit "B," & which he believes to have been according to the real fact, & literally true.

Witness further says that from the time of the erection of said wharf the same was in the actual possession of witness & his tenants, & used for the purposes in the bill of complaint specified, up to the conveyance thereof to the complainant; that since that time the complainant has been, & still is, in the actual & full possession thereof by his tenants, receiving rent therefor.

Witness further says that he bought said premises after the decision of the supreme court of this State in the case of Walker vs. Shepardson, reported in 4 Wisconsin Rep. 486, in full reliance thereon, & upon the strength thereof, &, besides the purchase-money of the grounds,
63 expended over five thousand dollars in building said dock, dredging, &c.; that he was the attorney of said Shepardson in the case referred to, &, after his purchase, he obtained the map & soundings referred to in the testimony of Trowbridge, from the files of the supreme court, upon special leave granted for that purpose, in order to protect his interest in case of future litigation.

Witness further says that Shepardson & himself paid to the city treasurer of Milwaukee the sum of about $450 for the tax certificate of

sale of the property assessed & sold by it, described in its deed to them of the date 23d May, 1864, not one cent of which has ever been refunded, or offered to be refunded, & that the same does include the property of the complainant in this case, as is abundantly manifest both by the description given in the deed and the amount of taxes assessed thereon, and upon lots 1 and 2 in the same block, the amount of taxes assessed upon lots 1 and 2, each being 40 feet, being over four times less than the tract lying easterly of the westerly 40 feet of lot 1; when if 65 feet east of said lot one was only assessed & sold, the taxes thereon would been less than twice lot 1.

Witness further says that this suit was commenced in the year 1864, & that since that time the city has reduced the taxes upon the lands lying easterly of the westerly 40 feet of lot 1, from $118 54 for the year 1864 to only $31 47 for the year 1865, while for lot 1 it was $33 80 for the year 1864 and $30 60 for the year 1865; but that the description of the lands assessed & sold has remained the same.

Witness further says that immediately after the completion of the said wharf & the soundings taken as aforesaid, he caused & procured, at an expense exceeding two thousand dollars in cash for dredging-alone,
64 the Menomonee River next adjacent to said wharf on the north, & the Milwaukee River next adjacent to said wharf on the east, to be dredged out to the depth of twelve feet, to the extent of fifty feet from the wharf north on the Menomonee River, and one hundred feet distant from the wharf east on the Milwaukee River, both for the purpose of obtaining material for filling in his said wharf four feet high above the level of the water, and to render said wharf accessible by vessels.

Witness further says that before any dredging was done the Menomonee River was never navigable by vessels drawing four feet of water, & that no vessel drawing that amount of water, or more, could approach the ground where witness built said wharf nearer than two hundred feet.

Witness further says that such are the quantities of bog, silt, sand, weed, & earth annually brought down the Menomonee River at high water & deposited next said wharf, that he has been compelled to have the same dredged out again three times within the last ten years, in order that vessels might approach said wharf.

Witness further says that by the map of partition, & all the maps of the city ever in existence since that time, lot 1, in block 158, is represented as abutted & bounded by the Menomonee River on the north, & the bayou & Milwaukee River on the east; that the wharf in question is but an extension to the east of said lot one towards the Milwaukee River; that for witness to have extended his wharf eastward or southeasterly to a point where the Milwaukee River was in fact navigable for such vessels as were then engaged in navigating the lake & river, calling eight feet navigable waters, he should have built his said wharf over one hundred & fifty further east than it now is.

Witness further says that there has never been any navigation or commerce upon the Milwaukee River, separate & apart from such
65 vessels as navigate Lake Michigan, except since said wharf was erected tugs have been introduced & employed to tow lake vessels in & out of the river, & that even such tugs draw and require from 6½ to 8 ft. of water.

PETER YATES.

Deposition of Jacob Nunnemacher.

Jacob Nunnemacher, being first duly sworn, testified as follows:

I recognize my signature to the diagram in pencil-mark, marked Exhibit "B," as my signature; I likewise remember the majority of the names subscribed thereto as having been present; I likewise remember distinctly the facts & circumstances attending the soundings and the distances thereof as specified in said exhibit; I have likewise heard read the testimony of Peter Yates in relation thereto, and corroborate the same; and believe the said diagram to be a correct and true representation of the matters thereby represented.

JACOB NUNNEMACHER.

Deposition of Benj'n Bagnall.

Benjamin Bagnall, being produced on the part of the complainant, and duly sworn, testified as follows:

I recognize my signature to the paper in pencil-mark called Exhibit "B," and likewise recollect that the other persons whose names follow mine were present and witnessed the soundings taken, as specified in said diagram; I have heard read the testimony of Peter Yates given in this cause, in relation to the time and manner of taking said soundings, and I distinctly remember the facts to be as by him stated; the figures upon said diagram of the depth of water in inches were according to the fact; I have resided in the city of Milwaukee for the last twenty-five years, and I have been engaged in the lumber business in said city for the last twenty-two years, and have been the owner of one or more vessels during the whole of that time; I know the location of the Yates dock, so called; I have known the ground where the
66 same was built ever since I have been here in Milwaukee; the place where the said dock was built were never navigable waters, but was a bayou, marsh, or mud flat, with grass growing therein; until said Yates caused the adjacent grounds to be dredged, no vessel could reach the wharf within one hundred feet from the Milwaukee River.

BENJAMIN BAGNALL.

Deposition of James Porter.

James Porter, being produced and sworn on the part of the complainant, testifies as follows:

I have resided in the city of Milwaukee, State of Wisconsin, for more than thirty years. I have been owner and master of vessels from 1847 up to the present time most of the time. I know the premises called the Yates dock, at the junction of the Milwaukee and Menomonee Rivers. I remember when said dock was built. It was in 1856 or 1857. The channel of the river was to the northward of the said dock about twenty-five feet. I mean the Menomonee River. On the Milwaukee River, the channel was about two hundred feet from the dock. I mean the natural channel, before any dredging was done. The depth of water required for all vessels has been yearly increasing. The depth of water required at the present time for vessels of all classes navigating the lake and Milwaukee River, is from twelve to thirteen feet. The depth of water required for vessels of all classes, in 1856, was about twelve feet. I am the owner, in part, of two tugs; have an interest in two; they are used chiefly for towing vessels in and out of the river; they are used exclu-

sively for that purpose. One tug requires six, and the other seven and a half feet of water. The place where the Yates dock, so called, was built, was not, at the time it was built, or since, within the navigable waters of the Milwaukee River, in their natural state.

JAMES PORTER.

67 Wilson Graham, being produced on the part of the complainant, and duly sworn, testified as follows:

I have resided in the city of Milwaukee twenty-eight years. Lot one, (1,) block one hundred and fifty-eight, (158,) in the Fourth ward of said city, was set off to Alexander McDonald in 1837, in a suit in the district court of Milwaukee County, for the partition of lot or fraction six, (6,) of section twenty-nine, (29,) town. seven, (7,) range twenty-two, (22.) Lot one aforesaid is in the northeast corner of said block; said lot one (1) was purchased by myself and Clark Shepardson from Alexander McDonald, and conveyed to us by deed dated June 23d, 1848. I afterwards sold the undivided half of the said lot to Clark Shepardson, and conveyed the same to him by deed dated June 2d, 1853. I examined the records partially this morning, April 6th, 1867, and find on record a deed from Clark Shepardson & wife, dated May 22d, 1856, recorded in volume 52 of Deeds, page 334, of certain premises between the west line of said lot one (1) and the middle of the Milwaukee River, and more particularly described in said deed; the grantee in said deed is Peter Yates. I further found on record a trust deed from Peter Yates & wife to Rynier V. Yates, dated August 16th, 1864, recorded volume 87 of Deeds, page 187, of the same premises described in the deeds of said Shepardson & wife to said Yates.

WILSON GRAHAM.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I do hereby certify that the foregoing examination was taken and had before me, as one of the masters and examiners of the United States circuit court for said district, on the 3rd, 4th, 5th, & 6th of April,
68 1867, at my office in the city of Milwaukee, in said district, in the presence of Peter Yates, of counsel for the said complainant. That the above-named witnesses were by me first duly sworn true answers to make to all such questions as should be put to them touching the matters in controversy in the above-entitled cause. That said examinations so made of said witnesses, on oath, were by me reduced to writing, or caused to be so reduced, in the presence of said witnesses, and were then carefully read over by me to said witnesses, or by said witnesses, and by said witnesses subscribed in my presence.

April 8th, 1867.

WM. G. WHIPPLE,
U. S. Circuit C't Commissioner, District of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I hereby further certify that each of the deponents above named is personally known to me, & that each of them is a credible person, of good standing in the community, and worthy of belief.

WM. G. WHIPPLE,
U. S. Circuit C't Commissioner, District of Wisconsin.

Exhibit "A."

Exhibit "A."—State of Wisconsin and city of Milwaukee to Clark Shepardson & Peter Yates. Tax deed. Received for record on the day of , A. 186 , at o'clock m., and recorded in volume of Deeds, on page —Tax deed.

[One dollar int. rev. stamp, canc'd: M. B., May 23, '64.]

To all to whom these presents shall come, greeting:

Whereas Clark Shepardson & Peter Yates, assignees of the city of Milwaukee, has deposited in the office of the treasurer of the city of Milwaukee, in the State of Wisconsin, one certificate of the treasurer of said city Moritz von Baumbach, whereby it appears (as the fact is) that the 69 following described piece or parcel of land, lying and being situated in the city of Milwaukee, in the county of Milwaukee, State of Wisconsin, to wit, a piece of land lying easterly of the westerly forty (40) feet of lot No. one, (1,) in block No. one hundred and fifty-eight, (158) between the northerly and southerly lines of block No. one hundred and fifty-eight extended, being in section No. twenty-nine, (29,) in the Fourth ward, city of Milwaukee, aforesaid, for three hundred and thirty-nine dollars and sixty-nine cents, ($339 $\frac{69}{100}$,) was, for the non-payment of taxes sold by the treasurer of the city of Milwaukee, at public auction, at the office of said treasurer in the city of Milwaukee, and State of Wisconsin, on the twentieth day of January, in the year of our Lord one thousand eight hundred and sixty, to the said city of Milwaukee for the sum of three hundred & thirty-nine dollars and sixty-nine cents, in the whole which sum was the amount of taxes assessed and due and unpaid on said tract of land, together with the costs and charges of such sale due therewith at the time of making such sale; the whole of which sum of money has been paid by the aforesaid purchaser.

And whereas it further appears (as the fact is) that the owner or claimant of said lands has not redeemed from said sale the lands which were sold as aforesaid, and said lands are now unredeemed from such sale, whereby said described lands have become forfeited, and the said purchaser, its assigns, are entitled to a conveyance thereof:

Now, therefore, know all men by these presents, that the said City of Milwaukee, in said State, and the State of Wisconsin, in consideration of the said money aforesaid, and the premises, and in conformity to law, hath, and hereby doth give, grant, and convey the said tract of land above described, together with the hereditaments and appurtenances, to the said Clark Shepardson and Peter Yates, and to their heirs and assigns, to their sole use and benefit, forever.

70 In testimony whereof, I, Michael Bodden, the treasurer of the city of Milwaukee, have executed this deed pursuant to and in virtue of the authority in me vested by the statutes of the State of Wisconsin, and for and on behalf of the said State, and of the city of Milwaukee aforesaid, and have hereunto subscribed my name, officially, and affixed the seal of the said city of Milwaukee, at the city of Milwaukee, in the said county of Milwaukee, State of Wisconsin, on the twenty-third day of May, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.]

MICHAEL BODDEN,
Treasurer of the City of Milwaukee.

Done in presence of—
JAMES P. WHITE.
FRED. WILMANNS.

STATE OF WISCONSIN, *Milwaukee County, ss:*

On this twenty-third day of May, A. D. 1864, before me personally appeared the above-named Michael Bodden, to me personally known, and known to me to be the treasurer of the city of Milwaukee, and acknowledged to me that he, as treasurer of the city of Milwaukee, in said State, executed the foregoing instrument as the deed of the said city of Milwaukee, and of the State of Wisconsin, for the uses and purposes therein set forth.

FRED. WILMANNS,
Notary Public, Milw. Co., Wis.

(Here follow maps marked No. 1 and 2, pages 71 and 72.)

73 U. S. circuit court, district of Wisconsin.—In equity.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE.

Please take notice that the defendant in this cause desires the evidence to be adduced in the cause to be taken orally before Wm. G. Whipple, an examiner of said court, at his office, No. 4 Young's block, in the city of Milwaukee, on the 11th day of November inst., at 10 o'clock in the forenoon of that day; which time and place have been fixed by the order of the said examiner, a copy of which order is hereto annexed.

D. G. HOOKER, *Def't's Sol'r.*

To PETER YATES, Esq'r, *Compl't's Solicitor.*
Dated Nov. 9th, 1867.

U. S. circuit court, district of Wisconsin.—In chancery.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE.

Upon the application of the def't's solicitor it is ordered that the examination of witnesses in this cause be had before me, at my office, No. 4 Young's block, in the city of Milwaukee, on the 11th day of November inst., at 10 o'clock a. m. of that day.
Dated Nov. 9th, 1867.

WM. G. WHIPPLE,
U. S. Commissioner District of Wisconsin.

Service of within admited. Nov. 9, 1867.
PETER YATES, *Compl't's Sol'r.*

U. S. circuit court, district of Wisconsin.

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE.

74 Examination in the above-entitled cause by virtue and in pursuance of the annexed order and notice taken and had before William G. Whipple, one of the masters of said court, at his office in Young's block, in the city of Milwaukee, in said district, on the 11th, 16th, & 18th of November, and the 6th of December, 1867.

At said times Peter Yates, esq'r, appeared as solicitor for the complainant, and D. G. Hooker, esq'r., as solicitor for said respondent.

Deposition of Theo. D. Brown.

Theodore D. Brown, being produced on the part of the defendant, and duly sworn, deposes and says:

I am deputy surveyor of the city of Milwaukee, and as such have the original map of the dock lines in the office of the surveyor of the city of Milwaukee. The paper here exhibited to me, and hereto attached and marked "Exhibit A," was made by me and under my direction, and it is a correct copy of the original map of dock lines of that part of the river and adjoining land represented on said map; except that the copy shows the measurements and situation of what is known as the Yates dock. The red lines show the established dock line, and the lines of this dock. The line represented as commencing at the northeast corner of lot one, (1,) block one hundred and fifty-eight, (158,) and running parallel to Reed street, shows the dock line as established by the ordinance of June 8th, 1855, appearing on pages 314 & 315 of the printed Book of Ordinances of the city of Milwaukee, of December 5th, 1856. This line strikes the west line of the dock at a point in the continuation of the southerly line of block one hundred and fifty-eight, (158,) at a distance of fifty-three & $\frac{64}{100}$ feet easterly of the southeast corner of said lot one, (1.) And the easterly line of lot one (1) runs at the angle as represented on this map, leaving the land between the original dock line and lot one (1) in the form of a triangle as represented. The
75 line represented as running parallel to the easterly line of lot one (1) shows the dock line as established by an ordinance of 1863; the distance from the northeast corner of lot one, (1,) to the northeasterly extremity of the dock is one hundred and ninety & $\frac{14}{100}$ feet. The distance from the original dock line, where it intersects the southerly line of the dock to the southeasterly extremity of the dock, is one hundred and fifty (150) feet. The dock line as now established in front of block (158) runs one hundred feet parallel with the easterly line of lot one, (1,) from the north to the point where it intersects the original dock line, and thence sixteen (16) feet southerly on the original dock line. The easterly line of the dock is one hundred and seventeen & $\frac{50}{100}$ feet long. These measurements were made by me, and are correctly represented on this diagram. The representation of the dock and its measurements is really no part of the original map of dock lines. The two crosses represented in the river represent swing bridges, which are opened for the passage of vessels.

I have seen the paper shown me, purporting to be a plat of fraction six, (6,) which includes said block one hundred and fifty-eight, (158.) (Said paper was produced before me, and by me marked "W. G. W., U. S. com'r" on the left upper corner.) The document now exhibited to me, and hereto attached, and marked "Exhibit B," is a correct copy of the original plat. It was made by me and under my direction. (The Book of Ordinances above referred is admitted by counsel on both sides to contain all the ordinances of the city in force at the time of publication, Dec. 5th, 1856, and it is admitted that the ordinance referred to as passed June 8th, 1855, was passed at that time, and went into force as an ordinance of the city.)

(The complainant's solicitor objects to so much of the testimony of the witness as relates to the plot purporting to be the original proprietor's plot, and the copy thereof; because, first, there is no evidence that it is what it purports to be; second, because upon its face it
76 appears not to be the act of all the original proprietors named; third, that it was not at all recorded until after the lapse of more

than twenty (20) years after the same purports to have been made, and that it was then recorded without authority of law; fourthly, because it is irrelevant and material. But the copy hereto annexed of the proprietor's plot is not objected to on the ground that it is not a copy certified to by the register of deeds; but the complainant's solicitor conceeds that this copy shall have the same effect as if it had been certified by the register of deeds.)

Cross-examination:

I cannot say whether there has ever been a dock line established on the north side of block one hundred & fifty-eight (158) on the Menomonee River; but there is, in fact, a dock on said line. By the dock line of 1863 there is left a strip of land between the easterly line of lot one, (1,) as laid down on the map, and the said dock line, to the extent of fifty-three & $\frac{64}{100}$ feet front on the Menomonee, and one hundred feet deep. Witness has no knowledge of the precise boundaries of the property of Yates or Shepardson, as claimed by them. This plat was designed to represent the dock line of 1863 rather than any dividing line between Yates and Shepardson.

Q. How long have you known the premises, land or water, embraced in the red lines on the plat; that is, embracing the premises in dispute?

Ans. I commenced business as surveyor, in Milwaukee, in 1853; since then I have had a general acquaintance with the premises in question.

Q. When was a wharf erected on those premises?

A. Several years ago, to the best of my knowledge; I can't say how many years.

Q. According to your best recollection, was it before or since 1858?

A. I cannot say whether it was before or since.

Q. Can you tell within three years?

77 A. I cannot.

Q. Was there a wharf where there is one now before the ordinance of 1863 was passed?

A. I believe there was.

Q. Had there been for several years?

A. There had been for some time previous.

Q. Has that wharf ever been increased or extended since it was first erected?

A. Not to my knowledge.

Q. About how high above the level of the river was said wharf constructed?

A. Between three & four feet probably.

Q. Was the wharf built in the same manner, and of the same height, as other wharves in the city?

A. I should say a greater portion of it was.

Q. Does not that "greater portion" embrace all the line of docking on the Milwaukee and Menomonee Rivers?

A. The greater portion.

Q. Assuming that all the ground east or southeast of lot one (1) proper is an extension of said lot, and that the Milwaukee River is in fact limited by the eastern boundaries of said extension, how much thereof, if any, would the following description embrace, viz: a piece of land lying easterly of the westerly forty (40) feet of lot number one, (1,) block 158, between the northerly and southerly line of block 158, extended to the Milwaukee River?

A. I cannot make such an assumption because it is not according to the facts.

Q. Why not?

A. Because I don't think it is according to the truth of the matter.

Q. Is there not in fact a dock of the length of $190\frac{14}{100}$ feet from the northeast corner of lot 1, as specified on said plat, on the line of docking of the Menomonee River?

A. Yes; at the junction of the two rivers.

Q. Do either the Milwaukee or Menomonee Rivers overflow the Yates dock as laid down upon said map?

78 A. I should say they did to some extent on the southerly side of the Yates dock, so called.

Q. Is not the part referred to by you as overflowed within the limits of Point street extended?

A. It may be.

Q. Is not the Milwaukee River on the west, as it has been ever since the Yates dock was constructed, bounded and limited by the eastern portion of said dock opposite the premises in question?

A. I can't tell where the western boundary of the Milwaukee River is; that is, whether it is the established dock line or the easterly boundary of the Yates dock.

Q. Are not the waters of the Milwaukee River on the west bounded by the eastern end of the Yates dock opposite thereto?

A. This diagram, Exhibit "A," shows that the Yates dock, or the east end of it, is projecting into the waters of the two rivers to some extent.

Q. Same question repeated.

A. Do you mean to ask me if the west line of Milwaukee River is the east line of the Yates dock?

Q. Same question again repeated.

A. A portion of the dock is not tight, so that the water extends through to some extent; otherwise the eastern boundary of the dock does form a temporary boundary to the river.

Q. What do you mean by temporary boundary?

A. I mean that I am unable to give the true western boundary of the river, for the reason. as I have stated, that the Yates dock projects into the river to some extent; and I call the boundary temporary, because I suppose it is uncertain how long the dock will continue where it is.

Q. Now if there was in reality a dock extending down the Menomonee River $190\frac{14}{100}$ feet on the Menomonee, and about 117 on the Milwaukee River, built in the manner that docks were usually built,

79 and used as such, why could you not answer my former question as to the boundaries of the ground specified?

(Defendant's solicitor objects to the question on the ground that it has not yet appeared that the Yates dock, so called, extended along either the Milwaukee or Menomonee River; and also on the ground that the witness has not yet been asked to describe the grounds.)

A. I believe I have not stated yet that the dock extended any number of feet on either river, and I do not consider that I have been asked to define the boundaries of the grounds.

Q. Supposing that all the ground east or southeast of lot one (1) proper is an extension of said lot, and that the Milwaukee River is in fact limited by the eastern boundaries of said extension, how much thereof, if any, would the following description embrace, viz: a piece of land lying easterly of the westerly forty (40) feet of lot number one, block 158, between the northerly and southerly line of block 158, extended to the Milwaukee River?

A. I cannot see how I am at liberty to make such a supposition.

Q. Question repeated.

A. Answer repeated.

Q. Suppose you were allowed to make such a supposition, what then would be your answer?

A. I should not accept the privilege; but if by the Milwaukee River is meant the east line of the Yates dock, the description you refer to covers the whole except that portion covered by the extension of Point st.; if, however, on the contrary, by the Milwaukee River is meant the dock line of 1855, then it will embrace only the triangle represented on the map.

THEODORE D BROWN.

Offering of testimony before com'r.

(Defendant's solicitor offers the ordinance above referred to,
80 passed June 8th, 1855, entitled "An ordinance to establish a dock line in the 4th ward south of the Menomonee River;" and also presents a copy of the ordinance hereto annexed, and marked Exhibit "C," and the same is admitted by the complainant's solicitor without objection; and also offers chapter 273 of Local Laws of Wisconsin for the year 1854, and presents a written copy of said copy, which is hereto annexed, and marked Exhibit "D," and it is admitted that the same is a true copy thereof; and offers a certified copy of the record in the suit of Solomon Juneau & others against Jonathan E. Arnold & others, in the district court of Milwaukee County, which record is hereto annexed and marked Exhibit E; also offers a certified copy of the original complaint, answer, & bill of exceptions in the case of Peter Yates against Truman H. Judd, in the county court of Milwaukee County, which record is hereto attached, and marked Exhibit F.

The last record, viz., that in the case of Yates vs. Judd, objected to by complainant's solicitor as irrelevant and immaterial.)

Examination adjourned by consent of parties to November 16th, 1867.

NOVEMBER 16TH, 1867, 2 o'clock p. m.—(Complainant's solicitor offers in evidence the original deed from Alexander McDonald to Clark Shepardson and Wallace W. Graham, of said lot one, (1,) block 158, which is hereto annexed and marked Exhibit "G."

Defendants' solicitor objects on the ground that it is incompetent, immaterial, and irrelevant.

Complainant's solicitor offers the original warranty deed of an undivided half of said premises from said Graham to said Shepardson, which is hereto annexed, and marked Exhibit "H." To which the defendants' solicitor objects for the same reasons as above.

81 Complainant's solicitor offers the original deed from Clark Shepardson and wife to Peter Yates of the premises described in the complainant's bill of complaint, which is hereto annexed and marked Exhibit "I." To which the defendants' solicitor objects for the same reasons as above.

Complainant's solicitor offers in evidence the original deed from Peter Yates and wife to the complainant of the same premises, which is hereto annexed and marked Exhibit "J." To which the defendants' solicitor objects for the same reasons as above.

Complainant's solicitor offers in evidence three several records of indictments, trials, and acquittals in the circuit court of Milwaukee County, entitled "The State of Wisconsin against Peter Yates for nuisance in erecting and continuing the wharf upon the premises in controversy," which are hereto annexed, and marked Exhibits "K," "L," & "M." To

each of which the defendants' solicitor objects, on the ground that they are, and each of them is, incompetent, irrelevant, and immaterial testimony; but no objection is made upon the ground that they are not a full transcript of the record.)

DECEMBER 5TH, 1867.—Examination resumed.

Deposition of A. R. K. Butler.

A. R. R. Butler, being produced on the part of the complainant, and duly sworn, deposed:

I reside in the city of Milwaukee, and am an attorney and counselor at law; I was retained, according to present recollection, by the city attorney, to assist the district attorney in the prosecution of Mr. Yates, upon an indictment for obstructing the navigation of the Milwaukee River; I think I drew the indictment, and assisted in the prosecution of the case all through; I was authorized by the then district attor-
82 ney, S. Park Coon, to represent him in the prosecution of the case; and the labors of the prosecution were chiefly, if not wholly, performed by me and my partner; I was paid for my services in this case by the city attorney, if I recollect aright; our account-book, or journal of original entries, was some years since taken from our office and has never been returned; our charges in the case were paid either by the city attorney or by the city; I think it was by the city attorney; I understood I was acting, on the retainer of the city attorney, on behalf of the city.

A. R. R. BUTLER.

Deposition of Ferd. Kuehn.

Ferdinand Kuehn, being produced on behalf of the complainant, and duly sworn, deposed:

I was comptroller of the city of Milwaukee in the year 1863; and as such, by the request of the officers of the city, entered a complaint before the grand jury against Peter Yates, for obstructing the navigation of the Milwaukee River; and upon which complaint, as I subsequently understood, an indictment was found; I entered this complaint, upon the request of the officers of the city, in my official and not in my private capacity.

FERD. KUEHN.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I do hereby certify that the foregoing examination was taken and had before me, as one of the masters of said court, at the times and place, and in the presence of counsel, as above stated; that the said witnesses were each by me first severally sworn true answers to make to all such questions as should be put to them touching the matters in controversy in the above-entitled cause; that said examinations, so made of said witnesses on oath, were by me reduced to writing in the
83 presence of said witnesses; and were then carefully read over by me to said witnesses respectively, and by said witnesses subscribed in my presence.

January 4th, 1868.—Fees, $16 60.

WILLIAM G. WHIPPLE,
U. S. Commissioner District of Wisconsin.

(Here follow maps marked page 84, No. 1, and page 85, No. 2.)

86 *Exhibit C.*

AN ORDINANCE to establish a dock line in the Fourth ward, south of the Menomonee River.

The mayor and common council of the city of Milwaukee do ordain as follows:

SECTION 1. The dock line on the west side of the Milwaukee River, between the line dividing the Fourth and Fifth wards, shall be, and is hereby, permanently established as follows, to wit: Commencing at the northeast corner of block one hundred and fifty-eight, in the Fourth ward, at a point one hundred and forty feet east from Reed street, and running parallel with said street, to the line dividing the Fourth and Fifth wards, to a point the same distance from said Reed street.

Passed June 8, 1855.

Exhibit D.

[Chap. 273.]

AN ACT to amend an act entitled an "Act to consolidate and amend the act to incorporate the city of Milwaukee, and the several acts amendatory thereof."

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The eleventh section of chapter ten of the act of which this is amendatory is hereby amended so as to read as follows: Bridges shall be maintained and supported across the Milwaukee and Menomonee Rivers, at the expense of the city, as follows: one from Water street, in the First ward, to the foot of Cherry street, in the Second ward; one from the foot of Division street, in the First ward, to Chestnut street, in the Second ward; one from the foot of Oneida street, in the First ward, to Wells street, in the Fourth ward; one from the foot of Wisconsin street, in the First and Third wards, to Spring street, in the Fourth ward; one from the foot of Water street, in the Third ward, to Ferry street, in the Fifth ward; and one across Menomonee River, at the foot of West Water street. All of said bridges, except the first above mentioned, shall be turn-table bridges, or shall contain draws sufficient for the passage of vessels: *Provided*, The bridge from the foot of Division street in the First ward, to the foot of Chestnut street, in the
87 Second ward, shall not be used or extended as a railroad bridge.

SEC. 2. The common council shall have power, by ordinance, to establish dock and wharf lines upon the banks of the Milwaukee and Menomonee Rivers, restrain and prevent encroachments upon said rivers, and obstructions thereto; and to construct, alter, and maintain, or cause to be constructed, altered, and maintained, at the expense of the city, wharves along the banks of said rivers, where the same are not required by law to be constructed and maintained at the expense of the owners of the lots bounded on said rivers; and also to cause the said Milwaukee River to be dredged at the expense of the city, for so much thereof as is not by law chargeable to the lots bounded on said river.

SEC. 3. The common council of the city of Milwaukee is hereby authorized and empowered to issue bonds of the city in its corporate name, to be signed by the mayor and countersigned by the clerk of said city, to an amount not exceeding fifty thousand dollars, and bearing interest at the rate of not more than seven per cent. per annum, as the common council may determine, and payable twenty years from the

date of their issue, said bonds and the proceeds thereof to be applied exclusively to pay the expense of dredging so much of the Milwaukee River, between the "straight cut" or centres and the bridge at the foot of Cherry street, in the Second ward, and the docking of its banks, as is not now by law chargeable to the lots and lands bounded on said river; and the common council of said city are hereby authorized and directed to levy and collect annually on all the taxable property in said city, a tax sufficient to pay the annual interest on said bonds, in the same manner as other taxes are levied and collected by law, and finally to pay the principal when it shall become due.

SEC. 4. The common council may contract with the lowest or best bidder for the dredging and docking provided for in the last pre-
88 ceding section: *Provided, however*, They shall have power, in their discretion, to direct the street commissioners of the several wards to contract with the same, or other persons, for such dredging and docking as is chargeable to lots and lands, and may, in all things relating to such dredging and docking, order and direct the street commissioners of the several wards, as they shall deem proper, and for the best interest of the city and the separate wards.

SEC. 5. The eighteenth section of chapter six of the act of which this is amendatory is hereby so amended as to give one year's time for the payment, tendering, or depositing of the damages provided for in said section.

SEC. 6. This act shall take effect and be in force from and after its passage.

Approved March 31, 1854.

Exhibit E.

Pleas before the Honorable William C. Frazier, judge of the third judicial district of the Territory of Wisconsin, and presiding judge of the U. S. district court within and for the county of Milwaukee in said Territory, at a term of said court begun and holden at the court-house in the town of Milwaukee, on the first Monday of November, A. D., 1837—Owen Aldrich, esq'r, sheriff; Cyrus Hawley, clerk.

SOLOMON JUNEAU, MORGAN L. MARTIN, GEORGE Reed, Sam'l H. Graves, John S. Rockwell, Michael Dousman, Henry W. Cleveland, Cyrus Leland, and Onslow Peters,

vs.

JONATHAN E. ARNOLD, RUSSELL PRENTICE, Herman V. Prentice, and Daniel Bigelow, & others unknown.

Be it remembered that heretofore, to wit, on the 13 day of
89 November, A. D. 1837, come the said plaintiffs, by their certain attorneys, and file in the office of the clerk of said court their certain petition and notice in the words and figures following, to wit:

To the Hon. William C. Frazier, judge of the third judicial district of the Territory of Wisconsin:

SIR: The petition of Solomon Juneau, Morgan L. Martin, George Reed, Samuel H. Graves, John S. Rockwell, of Wisconsin; Michael Dousman, of Michigan; Henry W. Cleveland, Cyrus Leland, & Onslow Peters, of Illinois, respectfully sheweth that your petitioners, together with Jonathan E. Arnold, of Milwaukee; Russell Prentiss, of Upper

Canada; Herman V. Prentice, of New York; & Daniel Bigelow, of Wisconsin, together with others whose names and interests to your petitioners are unknown, hold and are in possession, as tenants in common, of fraction No. six of section twenty-nine, township seven, range twenty-two, n Milwaukee County, containing forty-six acres and forty-two-hundredths of an acre.

In which Solomon Juneau & Morgan L. Martin have an estate in fee of fifteen & $\frac{22}{100}$ acres; in which George Reed hath an estate in fee of four acres; in which Samuel H. Graves hath an estate in fee of three-quarters of an acre; in which John S. Rockwell hath an estate in fee of one-quarter of an acre; in which Michael Dousman hath an estate in fee of four & $\frac{40}{100}$ acres; in which Henry W. Cleveland, Cyrus Leland, & Onslow Peters have an estate in fee of one equal undivided eighth part of said premises; in which Jonathan E. Arnold hath an estate in fee of one acre; in which Russell Prentiss hath an estate in fee of one acre; in which Herman V. Prentice hath an estate in fee of one acre; & in which Daniel Bigelow hath an estate in fee of one acre; and some person or persons to your petitioners unknown have estates or interests, the nature and conditions of which to your petitioners are unknown, in the residue.

90 And your petitioners, being of full age, pray for a partition and division of said premises according to the respective rights of the parties interested therein, and force sale of the said premises, if it shall appear that partition thereof cannot be made without great prejudice to the owners; and also that commissioners may be appointed to make partition of said premises, according to the form of the statute in such case made and provided.

Dated this 11th day of Aug., 1837.

SOLOMON JUNEAU.
M. L. MARTIN.
GEO. REED.
S. H. GRAVES.
J. S. ROCKWELL.
H. W. CLEVELAND.
ONSLOW PETERS.
CYRUS LELAND.
MICHAEL DOUSMAN.

TERRITORY OF WISCONSIN,
Milwaukee County, ss:

George Reed, one of the above-named petitioners, being duly sworn, deposeth & saith that the matters contained in the above petition are true to the best of the deponent's knowledge, information, and belief; and further saith not.

GEO. REED.

Subscribed & sworn before me this 11th day of Aug., A. D. 1837.
JNO. P. HILTON,
Sup. Court Com.

To Jonathan E. Arnold, Russell Prentiss, Herman V. Prentice, & Daniel Bigelow, and all others unknown, having or claiming any interest in the premises described in the above petition:

Please take notice that a petition, of which the above is a copy, will be presented to the district court in and for the county of Milwaukee,

on the first Monday of November next, at the court-house in the town of Milwaukee, at the opening of court on that day, or as soon thereafter as counsel can be heard; and that an application will be thereupon made to the said court for the appointment of commissioners, pursuant to the prayer of the said petition.

91 Dated this 11th day of August, A. D. 1867.

SOLOMON JUNEAU.
M. L. MARTIN.
GEO. REED.
S. H. GRAVES.
J. S. ROCKWELL.
H. W. CLEVELAND.
ONSLOW PETERS.
CYRUS LELAND.
MICHAEL DOUSMAN.

WELLS & CROCKER,
Att'ys for Petitioners.

Same day, to wit, November 13, 1837, copy of the original petition in the above-entitled action filed, with proof of publication annexed thereto, in the words and figures following, to wit:

TERRITORY OF WISCONSIN,
Milwaukee County, ss:

Daniel H. Richards, being duly sworn, deposeth & saith that he is proprietor & publisher of the Milwaukee Advertiser, published in Milwaukee, and that there has been published in said paper a petition & notice, of which the annexed is a copy, for the period of three months previous to the first Monday of November, once in each week; & further saith not.

DANIEL H. RICHARDS.

Subscribed & sworn before me this 9th day of Nov'er, A. D. 1837.
WM. N. GARDNER,
Notary Public.

Same day, to wit, November 13, 1837, copy of the original petition & notice of application for appointment of commissioners in the above-entitled action filed, with acceptances of service thereof endorsed thereon, as follows:

"I hereby accept due notice and service of the petition and notice hereto annexed.

"DANIEL BIGELOW."

"I hereby accept due notice and service of the petition and notice hereto annexed.

"J. E. ARNOLD."

Same day, to wit, November 13, 1837, consent filed as follows:

DANVILLE, *Aug't 16th*, 1837.

DEAR SIR: We, the undersigned, part owners in fraction or lot No. six, in ————, take this method to inform you that we are willing to a decree of court for a partition of the said tract among the
92 owners at the first term of court, and desirous the same should be done.

We own interests as follows, to wit:
T. R. Moores, 3 acres; A. McDonald, one acre; H. Cunningham, ¾ of an acre; Jno. H. Murphy, one & ¼ acre; & the heirs of J. H. Alexander, dec'd, one acre. Titles all from S. Juneau.

Yours respectfully,

JNO. H. MURPHY.
ISAAC R. MOORES.
HE'RY CUNNINGHAM.
A. McDONALD.

Same day, to wit, November 13, 1837: This day came the parties, by their counsel, and, by mutual consent, it is ordered, adjudged, and decreed by the court that partition be made of the premises described in the complainants' bill, according to the prayer thereof, and that William A. Prentice, Joshua Hathaway, and Albert Fowler be appointed commissioners to make partition of the premises aforesaid, agreeably to the prayer of said bill; and thereupon commission issued in the words and figures following, to wit:

District court.—Nov. term, A. D. 1837.

TERRITORY OF WISCONSIN,
Milwaukee County, ss:

[SEAL.] The United States of America to William A. Prentiss, Albert Fowler, and Joshua Hathaway, commissioners:

Whereas Solomon Juneau, Morgan L. Martin, George Reed, Samuel H. Graves, and John S. Rockwell, of Wisconsin; and Michael Dousman, of Michigan; Henry W. Cleveland, Cyrus Leland, and Onslow Peters, of Illinois, at the court aforesaid, begun and holden at Milwaukee, on the seventh day of November, A. D. one thousand eight hundred and thirty-seven, presented a petition to the Hon. William C. Frazier, judge of said court, setting forth in said petition that they, the said petitioners, together with Jonathan E. Arnold, of Milwaukee; Russell Prentiss, of Upper Canada; Herman V. Prentice, of New York; and Daniel Bigelow, of Wisconsin, together with others whose names and interests to said petitioners were unknown, held, and were in possession as tenants in common of the following premises, to wit: Fraction No. six of section twenty-nine, township seven, range twenty-two, in Milwaukee County, containing forty-six acres and forty-two-hundredths of an acre.

93

And whereas in said petition, said petitioners did pray for a partition and division of said premises, according to the respective rights of the parties interested therein, and for a sale of said premises, according to the respective rights of the parties interested therein; and the said petitioners appearing in this court, and Jonathan E. Arnold, Russell Prentiss, Herman V. Prentice, and Daniel Bigelow, and all others unknown, having or claiming any interest in the premises described as above, being duly notified to appear thereat, to answer the said petition; and it appearing to said court that the parties aforesaid have the following interests in the said premises, to wit:

Solomon Juneau	23 acres & $\frac{22}{100}$
Geo. Reed	4 "
Sam'l H. Graves	¾ "
J. S. Rockwell	¼ "
Michael Dousman	4 " $\frac{42}{100}$

on the first Monday of November next, at the court-house in the town of Milwaukee, at the opening of court on that day, or as soon thereafter as counsel can be heard; and that an application will be thereupon made to the said court for the appointment of commissioners, pursuant to the prayer of the said petition.

91 Dated this 11th day of August, A. D. 1867.

SOLOMON JUNEAU.
M. L. MARTIN.
GEO. REED.
S. H. GRAVES.
J. S. ROCKWELL.
H. W. CLEVELAND.
ONSLOW PETERS.
CYRUS LELAND.
MICHAEL DOUSMAN.

WELLS & CROCKER,
Att'ys for Petitioners.

Same day, to wit, November 13, 1837, copy of the original petition in the above-entitled action filed, with proof of publication annexed thereto, in the words and figures following, to wit:

TERRITORY OF WISCONSIN,
Milwaukee County, ss:

Daniel H. Richards, being duly sworn, deposeth & saith that he is proprietor & publisher of the Milwaukee Advertiser, published in Milwaukee, and that there has been published in said paper a petition & notice, of which the annexed is a copy, for the period of three months previous to the first Monday of November, once in each week; & further saith not.

DANIEL H. RICHARDS.

Subscribed & sworn before me this 9th day of Nov'er, A. D. 1837.
WM. N. GARDNER,
Notary Public.

Same day, to wit, November 13, 1837, copy of the original petition & notice of application for appointment of commissioners in the above-entitled action filed, with acceptances of service thereof endorsed thereon, as follows:

"I hereby accept due notice and service of the petition and notice hereto annexed.

"DANIEL BIGELOW."

"I hereby accept due notice and service of the petition and notice hereto annexed.

"J. E. ARNOLD."

Same day, to wit, November 13, 1837, consent filed as follows:

DANVILLE, *Aug't 16th*, 1837.

DEAR SIR: We, the undersigned, part owners in fraction or lot No. six, in ————, take this method to inform you that we are willing to a decree of court for a partition of the said tract among the
92 owners at the first term of court, and desirous the same should be done.

We own interests as follows, to wit:
T. R. Moores, 3 acres; A. McDonald, one acre; H. Cunningham, $\frac{3}{4}$ of an acre; Jno. H. Murphy, one & $\frac{1}{4}$ acre; & the heirs of J. H. Alexander, dec'd, one acre. Titles all from S. Juneau.

Yours respectfully,

JNO. H. MURPHY.
ISAAC R. MOORES.
HE'RY CUNNINGHAM.
A. McDONALD.

Same day, to wit, November 13, 1837: This day came the parties, by their counsel, and, by mutual consent, it is ordered, adjudged, and decreed by the court that partition be made of the premises described in the complainants' bill, according to the prayer thereof, and that William A. Prentice, Joshua Hathaway, and Albert Fowler be appointed commissioners to make partition of the premises aforesaid, agreeably to the prayer of said bill; and thereupon commission issued in the words and figures following, to wit:

District court.—Nov. term, A. D. 1837.

TERRITORY OF WISCONSIN,
Milwaukee County, ss:

[SEAL.] The United States of America to William A. Prentiss, Albert Fowler, and Joshua Hathaway, commissioners:

Whereas Solomon Juneau, Morgan L. Martin, George Reed, Samuel H. Graves, and John S. Rockwell, of Wisconsin; and Michael Dousman, of Michigan; Henry W. Cleveland, Cyrus Leland, and Onslow Peters, of Illinois, at the court aforesaid, begun and holden at Milwaukee, on the seventh day of November, A. D. one thousand eight hundred and thirty-seven, presented a petition to the Hon. William C. Frazier, judge of said court, setting forth in said petition that they, the said petitioners, together with Jonathan E. Arnold, of Milwaukee; Russell Prentiss, of Upper Canada; Herman V. Prentice, of New York; and Daniel Bigelow, of Wisconsin, together with others whose names and interests to said petitioners were unknown, held, and were in possession as tenants in common of the following premises, to wit: Fraction No. six of section twenty-nine, township seven, range twenty-two, in Milwaukee County, containing forty-six acres and forty-two-hundredths of an acre.

93

And whereas in said petition, said petitioners did pray for a partition and division of said premises, according to the respective rights of the parties interested therein, and for a sale of said premises, according to the respective rights of the parties interested therein; and the said petitioners appearing in this court, and Jonathan E. Arnold, Russell Prentiss, Herman V. Prentice, and Daniel Bigelow, and all others unknown, having or claiming any interest in the premises described as above, being duly notified to appear thereat, to answer the said petition; and it appearing to said court that the parties aforesaid have the following interests in the said premises, to wit:

Solomon Juneau	23 acres & $\frac{22}{100}$
Geo. Reed	4 "
Sam'l H. Graves	$\frac{3}{4}$ "
J. S. Rockwell	$\frac{1}{4}$ "
Michael Dousman	4 " $\frac{40}{100}$

...ument to the Graphic December 25, 1870

Hen. W. Cleveland, Cyrus Leland, & Onslow Peters	1/8 of 46 & 42/100 acres.	5	" 80/100
J. E. Arnold		1	"
Russell Prentiss		1	"
Herman V. Prentice		1	"
Daniel Bigelow		1	"
A. McDonald		1	"
H. Cunningham		3/4	
Jno. H. Murphy		1 1/4	
Heirs & ex'ors of Alexander		1	
		46	42/100

Now, therefore, know ye, that reposing confidence in your in-
94 tegrity and wisdom, we do authorize, empower, and direct you, the said commissioners, after being duly sworn according to law, to make partition and division of said premises in manner following, to wit:

You will set off by metes and bounds to the above-named parties their respective interests, as found by the court, which have been defined in the above schedule, and in making said partition you will consider the quality and quantity, according to the respective rights of the parties interested in said premises; before proceeding to make partition as hereinbefore directed, you will cause an accurate survey and plat of the premises to be made, and a careful and just appraisal and valuation of each and every lot and parcel of the premises set off by you to the parties aforesaid, and you will designate on such plat the lot or lots set off by you to any or persons, with the valuation marked thereon; you will also designate, as aforesaid, those lots which are set off to the owners unknown. Having performed the several duties hereinbefore assigned to you, you will, as soon as may be thereafter, make a full and accurate return of your doings, with the plat aforesaid, to this court.

Witness the Hon. Wm. C. Frazier, judge of the third judicial district of said Territory, at Milwaukee, this 13th day of November, A. D. one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-second.

CYRUS HAWLEY, *Clerk.*

WISCONSIN TERRITORY,
Milwaukee County, ss:

We, Joshua Hathaway, Albert Fowler, and William A. Prentiss, being appointed commissioners by the Hon. William C. Frazier, judge of the district court of the county of Milwaukee aforesaid, to appraise and make division of fraction number six, in section twenty-nine, in township seven north, range 22 east, do solemnly swear that we will execute the duties confided to us, according to the best of our judgment,
95 abilities, and understanding.

WILLIAM A. PRENTISS.
JOSHUA HATHAWAY.
ALBERT FOWLER.

Subscribed and sworn to before me on the 14th day of November, A. D. 1837.

DANIEL WELLS, JR.,
Justice of the Peace, Milwaukee Co.

And thereupon came the commissioners, in this behalf appointed, and make their report in the words and figures following, to wit:

TERRITORY OF WISCONSIN, *Milwaukee County, ss:*

SOLOMON JUNEAU AND OTHERS IN PARTITION
vs.
J. E. ARNOLD AND OTHERS.

NOVEMBER 15TH, 1837.

We, William A. Prentiss, Joshua Hathaway, and Albert Fowler, commissioners appointed by the Honorable William C. Frazier, judge of the third judicial district of the Territory of Wisconsin, to make partition of the lands and premises in the above-entitled cause in question between the parties interested therein, (said premises being fraction No. six of section No. twenty-nine, township No. seven north, range 22 east,) do certify and return to the said court, that after our appointment, as aforesaid, we were duly sworn, according to law, honestly and impartially to execute the trust reposed in us as such commissioners, and to make partition as directed by the said court, and then went to the lands and premises aforesaid, and in pursuance of the authority and directions to us given for that purpose, made partition between the said parties, quality and quantity relatively considered, according to the respective rights and interests of the said parties as ascertained, declared, and determined by the court. We caused an accurate plat and survey
96 of said land and premises to be made, which said plat is hereto annexed and exhibited to this honorable court, to which we respectfully beg leave to refer.

And we further certify that we made division and partition of said premises as follows, to wit:

To Solomon Juneau as follows, to wit: Lots number 15 & 16, in block No. 82; lots 13 & 16, in block No. 83; lots 14 & 15, in block No. 84; lots No. 14 & 15, in block No. 85; lots No. 14, 15, 19, 20, in block No. 86; lot No. 9, in block number 87; lots 1 & 2, in block No. 141; lots 1, 2, 3, 7, 8, 9, in block No. 142; lots 4, 5, 6, 10, 11, 12, in block 143; lots 1, 2, 3, 7, 8, 10, 11, in block No. 144; lots 2, 5, 7, 9, 11, 13, 14, 19, 17, 16, in block 145; lots 1, 2, 5, 6, 9, 10, 13, 14, in block No. 146; lots 3, 4, in block No. 147; lots 1, 2, 5, 6, 10, 11, in block 148; lots 3, 4, 7, 8, in block No. 149; lots 2, 3, 7, 8, in block No. 150; lots 1, 2, 3, 4, in block No. 151; lots 1, 2, 7, 8, 11, 12, in block No. 155; lots 1, 2, 3, in block No. 156; lots 1, 2, 5, 6, 10, 11, in block 157; lots 3, 4, 6, 7, 10, 11, 12, in block No. 158; lots 3, 4, 5, 8, 9, 10, 11, in that part of the plat hereto attached and designated as the "Reserve."

To George Reed as follows, to wit: Lots number 14, 15, in block numbered 83; lot 10, in block 87; lot 12, in block 146; lot 6, in block number 147; lots 8 & 9, in block 148; lot 6, in block 150; lots 2 & 3, in block No. 143; lot 10, in block 142; lot 4, in block 156; lots 6 & 7, in that part of the plat hereto annexed called the "Reserve."

To Samuel H. Graves as follows, to wit: Lot 3, in block 146; lots 4 & 11, in block 142.

To John S. Rockwell: Lot number 1, in block No. 143.

To Michael Dousman as follows, to wit: Lots 13 & 16, in block number 85; lots 7 & 8, in block 146; lot 7, in block 148; lot 5, in block No. 149; lot 3, in block 141; lot 7, in block 143; lot 9, in block 144; lots 10 & 18, in block No. 145; lot 3, in block 155; lots 1 & 2, in that part of the annexed plat called the "Reserve;" and lots 8 & 9, in block No. 157.

97 To H. W. Cleveland, Onslow Peters, & Cyrus Leland as follows, to wit: Lots 5 & 6, in block No. 142; lots 5, 6, 12, 13, in block 144; lots 3, 4, 12, 15, in block No. 145; lots 11, 15, in block No. 146; lot 5, in block No. 147; lot 12, in block 148; lot 6, in block 149; lots 8, 9, 16, 17, in block 158; lots 3, 4, in block number 157; lot 16, in block 84.

To Jonathan E. Arnold: Lot 12, in block 142; lot 14, in block 82; lot 8, in block 145; lot 2, in block 147; lot 5, in block 156.

To Russell Prentiss as follows, to wit: Lot 3, in block 148; lot 1, in block 145; lot 19, in block No. 141; lot 9, in block No. 143.

To Herman V. Prentice as follows, to wit: Lot 1, in block No. 147; lots 13 & 14, in block 155; lots 13 & 16, in block 86.

To Daniel Bigelow as follows, to wit: Lot No. 6, in block 145; lot 4, in block No. 148; lot 9, in block 155; lot 21, in block No. 141.

To Alexander McDonald as follows, to wit: Lot 4, in block No. 144; lot 1 & 2, in block 158; lots 1 & 4, in block No. 150; lot 7, in block No. 157; lot 13, in block No. 84.

To H. Cunningham as follows, to wit: Lot 8, in block No. 143; lots 5 & 13, in block No. 158; lot No. 2, in block No. 149.

To John H. Murphy as follows, to wit: Lot 4, in block 146; lot 1, in block 149; lot 5, in block No. 150; lots 5 & 6, in block No. 155.

The heirs & executors of the estate of Isaac H. Alexander as follows, to wit: Lot No. 20, in block No. 141; lot No. 13, in block 148; lots 4 & 10, in block number 155; lots 14, 15, in block No. 158. Which includes the whole tract above described, to hold to them and each of them, their heirs, and assigns, forever, to their own use and behoof forever, in the proportions, and in the manner above specified, as & for the shares of each of the part owners of said premises, and to hold as is above

98 specified in severalty, as the same is adjudged by the said court.

In witness whereof, we, the said commissioners, have hereunto set our hands, and affixed our seals, the 15th day of November, in the year of our Lord one thousand eight hundred and thirty-seven.

WILLIAM A. PRENTISS. [SEAL.]
ALBERT FOWLER. [SEAL.]
JOSHUA HATHAWAY. [SEAL.]

In presence of—
DANIEL WELLS, Jr.
GEORGE BOWMAN.

NOVEMBER 15, 1837.

TERRITORY OF WISCONSIN, *Milwaukee County, ss:*

On the day and year last aforesaid, before me, came the said William A. Prentiss, Joshua Hathaway, and Albert Fowler, who severally acknowledged the execution of the above instrument for the uses and purposes therein mentioned.

DANIEL WELLS, JR.,
Justice of the Peace, Milwaukee Co.

The proprietors of fraction six, of section 29, in the town of Milwaukee, to Joshua Hathaway, jr., Albert Fowler, & Wm. A. Prentiss:

For services in making a division of said fraction six, under an order of the district court of Milwaukee County, ten dollars each; in the whole, $30 00.

Proprietors of fraction six, sec. 29, to Joshua Hathaway, dr.:

To making a map of said fraction, at the partition of the same, for the commissioners, three dollars, ($3 00.)

(Here follows map marked page 99.)

100 And thereupon it is considered, ordered, adjudged, and decreed by the court, that the report aforesaid be accepted, and that the partition, in this behalf made, be and remain firm and effectual forever.

November term, 1837.

Wells & Crocker, att'ys for petitioners.

SOLOMON JUNEAU, MORGAN L. MARTIN, George Reed, Samuel H. Graves, John S. Rockwell, Michael Dousman, Henry W. Cleveland, Cyrus Leland, & Onslow Peters,
vs.
JONATHAN E. ARNOLD, RUSSELL PRENTICE, Herman V. Prentice, Daniel Bigelow, and others unknown.
} In partition.

1837—NOVEMBER 13TH.

This day came the parties, by their counsel, and by mutual consent, it is ordered, adjudged, and decreed by the court that partition be made of the premises described in the complainants' bill, according to the prayer thereof, and that William A. Prentiss, Joshua Hathaway, and Albert Fowler be appointed commissioners to make partition of the premises aforesaid, agreeably to the prayer of said bill, and thereupon commission issued, &c.; and thereupon came the commissioners, in this behalf appointed, and make their report, &c.

And thereupon it is considered, ordered, adjudged, and decreed by the court, that the report aforesaid be accepted, and that the partition, in this behalf made, be and remain firm and effectual forever.

WILLIAM C. FRAZIER,
Judge 3d Judicial District, W. T'ry.

CYRUS HAWLEY, *Clerk.*

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

101 I, James Hickcox, clerk of said court, do hereby certify that I have compared the foregoing copy with the original record and proceedings entered in the action therein entitled; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 30 day of September, A. D. 1867.

[SEAL.] JAMES HICKCOX, *Clerk.*

STATE OF WISCONSIN,
County of Milwaukee, ss:

I, Arthur Mac Arthur, do hereby certify that I am judge of the second judicial circuit of said State, and presiding judge of the circuit court within and for the county of Milwaukee; that James Hickcox, whose name is subscribed to the certificate subjoined to the within record, is, and was at the date of said certificate, clerk of the circuit court for the county of Milwaukee & State aforesaid, duly elected and qualified; that I am well acquainted with his handwriting, and know the signature thereto to be genuine; and further, that said certificate or attestation is

in due form of law, and the seal thereto attached is the proper seal of said court.

Dated at Milwaukee this 30th day of September, A. D. 1867.

ARTHUR MAC ARTHUR,
Circuit Judge 2nd Judicial Circuit, Wisconsin.

Rec., Oct. 5, '67, of D. G. Hooker, eleven dollars, fees for this copy.

JAMES HICKCOX, *Clerk*,
By W. L. CLEAVER, *D'p'y.*

102 *Exhibit "F."*

State of Wisconsin supreme court.

PETER YATES, RESPONDENT,
against
TRUMAN H. JUDD, APPELLANT. } Case.

Wells & Brigham, att'ys for defendant.

103 State of Wisconsin, in the supreme court.

PETER YATES, RESPONDENT,
against
TRUMAN H. JUDD, APPELLANT. } Case.

This was an action in the nature of an action on the case to recover damages. The following is a copy of the complaint, to wit:

State of Wisconsin, county of Milwaukee, Milwaukee county court.

PETER YATES
vs.
TRUMAN H. JUDD. }

The complaint of Peter Yates, the plaintiff above named, complaining of Truman H. Judd, the defendant above named, respectfully shows to this court—

104 That the said plaintiff before and at the time of the committing of the grievances by the said defendant, as hereinafter mentioned, was, and from thence hitherto had been, and still is, possessed of a certain messuage and premises, situate in the county of Milwaukee, and city of Milwaukee, in the Fourth ward of said city, and bounded and described as follows, to wit: Commencing at a point in block number one hundred and fifty-eight (158) in said ward, on the south side of the Menomonee River, which point is on a line with the dock on the west side of the Milwaukee River, as said dock existed in the year of our Lord eighteen hundred and fifty-seven, next north of the Menomonee River, and running thence from said point on the present line of docking on the south side of the Menomonee River, easterly to the middle of the Milwaukee River; thence southerly with the center of said Milwaukee River to the section line; thence west on said section line to Point street in said city; thence northwesterly along the north side of Point street to a point on a line with a point of commencement, and the said line of docking in the Milwaukee River, on the north side of the Menomonee River, as it existed in said year of

our Lord eighteen hundred and fifty-seven; thence north on said last-mentioned line to the place of beginning; and the said premises and messuage the said plaintiff, at the times hereinafter mentioned, occupied and possessed, and still does occupy and possess.

The complaint of the plaintiff further shows that the said defendant before and at the time of committing grievances, wrongs, and injuries, hereinafter next mentioned, was, and from thence hitherto hath been, and still is, possessed of a certain piece or parcel of ground contiguous and near to the said messuage and premises of this plaintiff, and situate opposite to the said messuage and premises of this plaintiff,
105 and on the opposite and southerly side of Poin street. The complaint further shows that before and at the time of and ever since the committing by the said defendant of the grievances hereinafter mentioned, the said Point street has been and was a regularly opened and laid-out street in the city of Milwaukee. That before the time of the said grievances hereinafter mentioned, the portion of said Point street that passed by the side of the said messuage and premises of this plaintiff, having once been low ground, and partially covered by the shallow and unnavigable waters of the said Milwaukee or Menomonee River, had been filled up and graded, and made solid along the line of the said premises and messuage of this plaintiff, for about half the width of said street, to wit, the half of said street nearest to the said premises of this plaintiff, leaving the rest of said street still low ground and partially covered by the said shallow and not navigable waters of said rivers. The complaint further shows that at the time of the grievances hereinafter mentioned, and ever since said time, the said Point street did constitute, and has ever since constituted, the sole and only public road, street, or highway by which this plaintiff could or can reach his said premises by land, and were and are the only means which this plaintiff had or has to access to or exit from his said premises without trespassing upon the premises or messuages of other people.

Nevertheless the said defendant, contriving and intending to injure, prejudice, and aggrieve the said plaintiff, and incommode and annoy him in the possession and occupation and enjoyment of his said messuage and premises, heretofore, to wit, on the first day of June, A. D. eighteen hundred and fifty-seven, and on divers other days and times before the commencement of this action, did wrongfully and in-
106 juriously, and without authority of law, enter upon that said portion of said Point street, running by the said premises of the plaintiff, and did wrongfully and injuriously, and without authority of law, did dredge, dig out, and excavate the said Point street to a great depth, to wit, the depth of twenty feet, and did cause the same to be covered and flowed over with water. That by means and in consequence of said excavation and dredging the said messuage and premises of this plaintiff were by the said defendant undermined, and great portions of the soil and substance thereof drawn and washed away, and the said premises and messuage of this plaintiff greatly sunk and damaged, and the said Point street so destroyed and excavated as no longer to afford to the plaintiff a means of access to his said premises.

By means whereof and of the aforesaid wrongs and injuries, the said plaintiff hath been damaged and injured in the sum of two thousand dollars, and for which said sum plaintiff demands judgment against said defendant, and costs of this action.

PECKHAM & BLOODGOGD,
Att'ys for Plaintiff.

The defendant's answer is as follows, to wit:

County court Milwaukee county.

PETER YATES
against
TRUMAN H. JUDD.

The said defendant Truman H. Judd, by E. Mariner and
107 Wells & Brigham, his attorneys, for his amended answer to the plaintiff's complaint in the above-entitled action, alleges—

That the premises described in plaintiff's complaint, and to which he claims title, are part and parcel of lot or fraction No. six, (6,) of section twenty-nine, (29,) in township No. seven (7) north, of range No. twenty-two (22) east; that on or about the 24th day of June, A. D. 1837, said fraction six was the property of Jonathan E. Arnold, Henry W. Cleveland, Onslow Peters, Cyrus Leland, Samuel H. Graves, Morgan L. Martin, Soloman Juneau, George Reed, Michael Dousman, Isaac R. Moors, John H. Murphy, Hezekiah Cunningham, and Isaac R. Mooers and Alexander McDonald, executors of Isaac H. Alexander, deceased; that, so being the owners of said lot, they did on that day execute, under their hands and seals, a plat of said lot six, upon which plat they laid out and designated the premises described in the complaint herein as part and portion of the Milwaukee River, and did thereby dedicate the same to the public use as a highway by water; that at the time the said premises described in said complaint were a part of said river, that the depth of water thereupon was six feet and upwards, and that said river at the place aforesaid, to wit, at the premises mentioned in said complaint, was navigable for all such vessels and water craft as were then used in the navigation of said river and Lake Michigan, and that said premises mentioned in said complaint, after such platting and dedication as aforesaid, were, in fact, used and enjoyed by the public as a highway. This defendant, further answering, alleges that after such platting and dedication by the owners aforesaid, said Juneau, Martin,
Reed, Graves, Dousman, Cleveland, Peters, and Leland, and one
108 John S. Rockwell, impleaded the said Arnold, Russell Prentiss, Herman V. Prentiss, and others unknown in a suit, in the district court of the then Territory of Wisconsin for this county, for the partition of said lot six; that such proceedings were had in said suit, that by the consent thereto had of the parties thereto, the plat aforesaid was adopted by the court with the streets, and alleys, and rivers, as hereinbefore stated, indicated and platted thereon, and dedicated as aforesaid, and partition of said tract was adjudged and made by said court, by parcelling out, and dividing, and allotting the lots on said plat, and into which such fraction six had been subdivided by said plat; that such partition, division, and allotment were made with reference to the streets, alleys, and rivers designated and marked on said plat, and the several owners took and owned their respective lots and parcels in said tract under said judgment with reference to all such streets, alleys, and rivers designated on said plat, and the same were and became thereby, and the premises mentioned in said complaint, became thereby, a public highway by water, and was dedicated to public use, as such, and was in fact thereupon and thereafter used and enjoyed by the public and by the several owners of parcels in said fraction six aforesaid, as a public highway by water, and that the same has never at any time since been vacated or abandoned by the public as a highway as aforesaid.

The said defendant, further answering, shows to the court that after such partition of said lot six and the dedication of the premises described in said complaint to the public use as a highway, and the actual use and enjoyment of the same as such highway, the said plaintiff wrongfully, and without any authority of law, entered upon a
109 portion of said public highway, being part and parcel of the premises described in said complaint, and obstructed the same as a public highway, by filling up the bed of said river with earth, driving piles therein, and erecting a dock extending about one hundred feet eastwardly from the west dock line of said Milwaukee River in front of block No. 158, and occupied the same for private use, and thereby obstructed and hindered this defendant in passing and repassing over said highway, which last-mentioned occupation and possession is the same possession of the said plaintiff which is set forth in said complaint.

The defendant, further answering, alleges that after the partition of said lot six, and after the dedication of the said premises by the proprietors thereof, and by the judgment of the court as aforesaid, Daniel Wells, jr., Daniel Newhall, Moses Kneeland, James Ludington, Clark Shepardson, and Ephraim Mariner, by purchase from said proprietors of lot six, or some of them, through several mesne conveyances, became the owners of certain premises, a part of said lot six, which are bounded by said Milwaukee River, adjacent to the obstruction so placed in said river by said plaintiffs, and leased the same to the defendant, and this defendant went into possession thereof under said lease; that said plaintiff by the wrongful filling up of that part of the bed of said river, as aforesaid, greatly hindered and obstructed this defendant in the use of said leased premises, and in the free passage to and from the same; wherefore, this defendant carefully, and in a proper manner, dug out and removed a portion of the earth which had been so deposited by said plaintiff, adjacent to the premises of the said defendant, and south of the center line of Point street produced eastwardly to the center of Milwaukee River, as this defendant might lawfully do, which is
110 the same digging, dredging, and excavation mentioned in said complaint. That while this defendant was so removing said earth from said river, said plaintiff notified this defendant that he could not lawfully remove said earth, and this defendant thereupon desisted. This defendant afterwards applied to the city of Milwaukee, and the proper officers thereof, to cause such obstructions to be removed from said river, adjacent to the premises of said defendant, and he is informed and believes that afterwards one Cady was authorized and directed by the proper officers of the city of Milwaukee, and of the Fourth ward of said city, to remove a portion of the earth deposited in said river by said plaintiff as aforesaid, and that said Cady did, in obedience to such direction, excavate and remove from said river a portion of the earth so deposited by said plaintiff, which earth so removed from said river was by said Cady, at the request and instance of this defendant, used in filling the premises of this defendent. That said Cady did not dig, dredge, or remove earth from said river north of the center line of Point street, as it would be produced, to the center of said river.

This defendant, further answering, alleges that nearly the whole of the portion of the river so as aforesaid filled up and obstructed by said plaintiff, still remains so obstructed and useless as a highway, and is occupied by said plaintiff, and that thereby this defendant is greatly hindered and obstructed in the passage by water to and from his premises as aforesaid.

And this defendant, further answering, denies that any part or portion of Point street extends along or adjoins the premises so occupied by said plaintiff, or any part thereof.

And this defendant, further answering, denies each and every
111 material allegation contained in said complaint, and not hereinbefore specially admitted.

WELLS & BRIGHAM,
Att'ys for Defendant.

E. MARINER, *of Counsel.*

The following is a copy of the bill of exceptions as settled:

Circuit court, Milwaukee county.

PETER YATES
against
TRUMAN H. JUDD.

Be it remembered that the above-entitled action came on and was tried by a jury June 5th, 1863, upon the issues joined therein, the parties, plaintiff and defendant, appearing by their respective attorneys and counsel.

Whereupon the plaintiff, to prove his case, called Peter Yates, who being duly sworn as a witness in his own behalf, testified as follows:

I was in possession of the premises mentioned and bounded in the complaint, at the time alleged in the complaint; have been so ever since 1857. That land lies east of lot 1 in block 158, in the Fourth ward of the city of Milwaukee, and east of the ordinance dock line, so called, established by the common council of said city along the west side of the Milwaukee River. When I drove the piles in 1856, I drove them in water ranging from 1½ to 4 feet deep, on an average say of three
112 and a half feet deep, along the Menomonee River on the north, and the Milwaukee on the east of the premises so possessed by me. I drove the piles as close together as I could and built a dock 4 feet high. On the south side, in Point street, I drove piles some six feet apart and nailed boards on the inside to keep the filling from sliding out. I drove this row of piles for a temporary dock along in Point street, commencing at the east end at a point 14 feet south of the north side of Point street, and continued westward in a straight line to a point where the center line of Point street intersects the north and south dock line, on which the dock, in front of the defendant's property, is built; so that my work, when done, extended into Point street 14 feet at east end and 30 feet at the west end, which is at the north and south dock line. The land that I claim and possess, however, does not extend so far west as that, but the southwest corner of my possession is 40 feet east of the line of the north and south dock in front of the property occupied by the defendant. I drove the piles so that the heads were some two or three feet above the water, and spiked on boards to keep the filling in. My work averaged about three feet in height above the water. There is no way to get to my land except by Point street, or that part of it which I filled up. By dredging and filling I filled up the space on the inside of my dock as high as the piles. In June, 1857, I saw a dredge at work digging out earth south of and close up to the piles. I remonstrated with the defendant and the men on the dredge against this dredging. Judd said he had a lease of the lots which he occupied, which was on the south side of Point street and extended along

the dock line south to the south side of section 29, as shown on the plat; that he held a lease and was filling up the lots by this dredging under an agreement with his landlords who owned the ground; that he should
113 have credit on his rent for the filling so done, and that the owners authorized the dredging at the place where it was being done. The result was that in less than one year nearly the whole of the filling which I put in Point street, and in addition to that a portion of the filling on my ground next to that street was gone; after that the rush of water knocked off the planks that I had nailed on. At the point of entrance upon my property at the end of the year, a horse had to wade in the water to get upon my premises. I can't say how much earth has gone out. The whole of that part of Point street which I built was washed away.

The plaintiff's counsel then put this question to the witness:

In your opinion how much dirt was washed away from the street and lot?

(To this question the defendant objected because the witness does not appear to be competent to testify upon that point, and said county court overruled that objection and directed that question to be answered, and to that ruling and decision the defendant did then and there duly except.)

Answer. So much washed away, that at the west end and all along the piles it went out at an average of 4 feet deep; at the east end of my dock it went out deeper than that, and at the west end a foot or so deep. Also portions of the lot parallel with the street went off. I have had dredging done there twice since that and put on timbers.

On cross-examination by defendant he says:

This land came to to called lot 1, block 158, because the proprietors laid out the land and recorded a plat of it on which they designated this part in that way. I have seen the plat so made by the proprietors; Arnold had that plat for some time; this plat which is presented to me is the original plat of the proprietors of lot 6, of fractional sec-
114 tion 29, town. 7, of range 22 east, in Milwaukee County. (Exhibit "A" hereinafter inserted, and made a part of this bill of exceptions, is a true copy of the plat of the proprietors, so testified to by the witness with the certificates and other writings thereon.) Lot 6 of fractional section 29 is the tract in which the premises occupied respectively by the plaintiff and defendant are situated, and that tract borders on the Milwaukee River on the east, as shown on the plat. I know by the records which I have seen that fractional lot 6 in section 29 has been partitioned among the proprietors in court. The plat made so before by the proprietors was adopted in the partition proceedings, and so the plat in the partition record corresponds with the plat by the proprietors. This partition record before me is the one to which I refer; I believe it to be the correct record and plat in partition. (The paper hereinafter inserted, marked Exhibit "B," is a true transcript of the whole record of the partition proceedings, including the plat, and is hereby made a part of this bill of exceptions.) This paper or map now shown to me is a chart of soundings made by the city surveyor in 1855, showing the depth of the water at different points on and about the premises so possessed by me; the figures show the depth in feet and fractions of a foot. (The paper hereinafter inserted, marked Exhibit "C," is a correct copy of that chart of soundings, and is made a part of this bill of exceptions.)

The original plat made by the proprietors, the record and plat in partition, and the map of soundings so testified to by this witness, were then given in evidence on cross-examination, and copies of the same are hereto attached, marked respectively as aforesaid.

The witness further testifies:

I did the dredging in 1856. I can't tell whether Point
115 street was ever filled at all by me or by directions of the public authorities, but I think not; that part of the filling which I did, I did not do under any such direction; it has been filled some at various times out as far east as the dock line; I filled it some, Judd some, Elmore some; but very little, if any, of Point street had been filled before I made the dock. I made the dock in 1856. My relations to Shepardson were such that I did some filling on his lot, and on the street in front of his lot; did so voluntarily; not by direction of any public authorities. In 1856 and 1857 I filled the north side of Point street; filling on that kind of land will always settle some, but I can't tell how much. The land immediately east and south of Shepardson's warehouse was filled before I began; can't say how much; as early as 1849. I was present in 1856 when my work was going on. The water, when I commenced in the center of Point street, ten feet east of the ordinance dock line, was about 3 feet 3 inches deep, as shown by this map of soundings at the time when this map was made in 1854—map made in 1854. The surveyer gave his former testimony in 1855, and I made this temporary dock in 1856. West of the ordinance dock line I filled enough to make it passable; filled up say one foot high along Shepardson's lot to my west line. When I commenced my work in 1856 no filling had been done in Point street east of lot 2 in block 158; at that time all the land about there except a little around Shepardson's warehouse was under water—quite deep water. All there was of Point street then was a little filling to get to the warehouse and back again to Reed street. I filled in 1856 and 1857, but most in 1856. I have done some filling in Point street within two or three years. Most of Mr. Judd's half of Point street was done when they did the dredging.

From the ordinance dock line to my west line is, say forty odd
116 feet; my dock is 105 feet long; north and south it is about the same length. The defendant's land lies south of Point street and east of Reed street and is bounded by them; it is bounded on the south by the section line and east by the river. Judd was dredging in front of his dock and up from south to north towards and into Point street; he dredged up to within 15 or 20 feet of my piles. The ordinance dock line was made to run right down south from the most easterly point of Shepardson's property.

Judd did not dig down perpendicular. He dug from south to north; could do no other way, as the water east was too shallow for dredge to come up. The dredge scoop moves on the arc of a circle. I think the scoop came up at the top within 10 feet or so of the piles. The earth there was part muck and part sand. The top was vegatable matter; below it was sand, shells, marl, &c. I don't know at what angle this earth will stand. I can't tell how far east Judd dredged, nor can I tell how soon the earth began to fall away behind my piles.

The plaintiff, further to prove his action, called John Blend, who testified:

I was foreman on a dredge in 1857—Cady's dredge. Judd was around then. We dredged in front of Judd's lumber yard. I can't tell the number of yards that were dredged out, nor the time we were engaged

then. We calculated to make 12 feet of water—dredge three cuts, making about 90 feet. I am not certain whether we made 2 or 3 cuts. I judge that at the west end we dredged up to within ten to twelve feet of the piles in the east and west dock in Point street, then of course the earth on the bottom would slope down at an angle, say 45 degrees. The place where we dredged up so near the piles on the north was close up to Mr. Judd's dock; i. e., immediately east of Judd's dock, or
117 in the angle of the two docks. We did not dredge straight out parallel with the east and west dock north of us, but bore off on an angle till at the east side of our dredging we got 25 feet off from the Yates dock. We threw the earth on the land west. Near to Judd's dock the earth was muck; further east it was more sandy. A hole made by dredging in the river will fill up the quickest, of course, where there is a current. I have been engaged in the dredging business off and on seven years. Have often dredged the second time on same ground. I never dredged in this place but once. Never sounded there; can't tell how soon stuff would accumulate there—would in time. The dock along the premises occupied by the plaintiff was made with piles some feet apart and boarded up. Late years I have noticed that the earth has washed out some; can't say how long that happened after we dredged near there—a year or two. On the east and north side of Yates' premises I have found more sand; on south, more muck. The deeper we go the more sand we find. There was a dock on south side filled up to the top with earth.

On cross-examination he testified:

The dock on the south side was temporary, but was boarded up inside; wherever the water finds its way the sand will wash out. I can't tell whether Yates' dock was tight or not. Have had some experience in docking; whether boards will hold the earth or not, will depend upon the heighth of the bank. In two cuts we generally dig 50 to 60 feet wide; water before we dredged was some three to five feet deep. We dredge whole length of the dock that Judd occupies; calculated to come within 12 feet of Judd's dock, then slope down at an angle of about 45 degrees. I have dredged some west of this locality, where Jones' dock is; that has washed out some.

118 Whereupon the plaintiff, further to prove his case, called F. S. Blodgett, who, being sworn, testified as follows:

I made this chart of soundings, in evidence, in 1855; the soundings were made in 1854, chart made in 1855; I think it correctly represents the premises; I took the soundings myself, and the figures on the chart show the depths at different points at the time of the soundings. The distances from one point of soundings to another, on lines running out from shore, are about 10 feet; generally took three lines of soundings for each lot.

On cross-examination he testified:

At the time when I took the soundings, the water was two feet lower than it is now. If no dredging had been done, the water would be 5 feet 3 inches deep now, where it was 3 feet 3 then; in 1858 the water was still another foot higher than it is now; at that time it would have been 6 feet three inches deep without dredging, where the chart shows 3 feet 3 inches. The water rose in the lake and river every year from 1853 to 1858; then began to fall again year by year. It rose each of the years mentioned about the same amount. I have myself observed it

when it was three feet or more higher than it was when these soundings were made.

The plaintiff, further to prove his case, called R. K. Caswell, who, being duly sworn, testified:

I know the premises in question; I occupy a lumber yard near by; I have paid 25 cents per cubic yard for filling in that locality 4 years ago. I know the dock east of Shepardson's warehouse; I was there in 1858 when Bunker was there. The filling was considerably washed away along next to the temporary dock on south side of your ground in 1858. There was sometimes 8 inches of water at west end. There had to be plank walks to get on to the plaintiff's lot. I don't know whether this extended the whole length of lot or not. The place where I filled,
119 at 25 cents per yard, was next to Judd.

Then the plaintiff, further to prove his case, called Jonathan Taylor, who, being sworn, testified:

I have lived in Milwaukee many years; was engaged in grading business in 1854; not since then. Filling could be done with a dredge at 18 to 20 cents per yard; hauling dirt from bank cost more, say 30 to 35 cents per yard.

The plaintiff then called Henry Thies, who, being sworn, testified:

I was acquainted with the lot east of Shepardson's warehouse in 1857; I was foreman for McVickar; know that dredging was done south of that ground that year and in 1858; I was not there every day, but frequently went there. In ten or twelve days after the dredging, the earth began to settle; got to be 6 inches depth of water near the stable; it grew worse from time to time.

Cross-ex.:

The east end did not fall away; sinking commenced right in the angle of the two docks, and extended both ways. The injury was principally to that part of the filling in Point street; had to use plank to enable us to get in and out. The earth washed away so much during that year, that a man who went there to haul away lumber came back, saying that the water was so deep that he could not get through.

J. L. McVickar, sworn, testified:

I occupied the lot in 1857–'8–'9 and '60. I remember the dredging that was done in 1857 south of Yates' premises. The effect was to make it impassable to and from the lot, and to flood lumber. The evil began immediately after the dredging commenced; the street was injured thereby. The injury increased with lapse of time; did not all come at once. Point street became impassable till we put down lumber to haul lumber away
120 from the lot. The washing away commenced immediately; dirt first sank down in angle of the two docks, extended west and east 30 feet; it destroyed half of Yates' lot and some of Shepardson's. The injury was to the south part, extending to center of lot. The water came in 30 or 40 feet within the piles.

And thereafter the plaintiff rested his case, and thereupon the defendant also rested.

The judge instructed the jury as follows, at the defendant's request:

1st. That unless they find from the evidence that the dredging com-

plained of was done by the defendant, they must find for the defendant The plaintiff must prove that the act complained of was done by or by direction of the defendant, or he cannot recover in this action.

2d. In any event you cannot find for the plaintiff, unless you find it proved that the dredging complained of was done or caused to be done by the defendant, and that such dredging was the cause of the injuries to the plaintiff's property, which he complains of. If you are not convinced by the testimony that the acts of the defendant complained of caused the sinking and flowing away of the soft earth which the plaintiff filled into his temporary dock, but are of opinion, from the testimony, that the action of the water would have caused that soft earth to sink and flow away if the dredging complained of had not been done, then you must find for the defendant.

Whereupon the defendant asked the court to charge the jury as follows, to wit:

I instruct you that the Milwaukee River is by law a public highway by water, and no man has a right to obstruct or interrupt the use of it as such. Every man has a right to remove any obstructions from a highway, either by land or water, in a reasonable and careful manner; and if you find from the evidence that the temporary docking and
121 filling claimed to be erected and possessed by the plaintiff, was within the limits of the public highway by water, on the Milwaukee River, then he had no right to maintain them there, and he cannot complain that the consequence of the defendant's acts complained of was the reduction and injury of those erections.

And said county court refused to give said instruction to the jury, but denied the same, and the defendant then and there to that ruling and decision did duly except.

Whereupon the defendant further asked said court to instruct the jury as follows, to wit:

It is proved that the premises alleged to be possessed by the plaintiff and the defendant, respectively, are all embraced in fractional lot six of section 29, town. 7, in range 22 east, which borders on the east on the Milwaukee River; that this tract was laid out and platted by the proprietors in fee, by a recorded plat which is in evidence; that the same land was afterwards divided in partition in the suit, the record of which is also in evidence, among the proprietors thereof, and that the map of soundings in evidence shows correctly the depths of the water on and adjacent to the premises claimed to be possessed by the plaintiff before the dredging and filling were done. And I charge you that if you find that the ground so claimed to be possessed by the plaintiff, was and is in the bed of the Milwaukee River, and covered by the waters thereof in its natural condition, and that the proprietors of said tract, by their said recorded plat, intended to leave open and dedicate to the public use as a highway by water, a portion of said tract in or under said river, embracing the land so claimed to be possessed by the plaintiff, and that the same plat and dedication was recognized, assented to, and affirmed in said partition, then neither those proprietors nor any one claiming after and under them, can interrupt the highway or occupy for private
122 use by right any portion of the ground so dedicated. The plat of the proprietors on record and in evidence is competent testimony, which it is proper for you to consider upon the question as to what land the proprietors intended to dedicate as a highway.

And said court refused to give that instruction to the jury, but denied the same; and the defendant to that ruling and decision did then and there duly except.

Whereupon the defendant further asked said court to instruct the jury as follows, to wit:

If you find from the evidence that the whole premises in question possessed by the plaintiff are within the limits of the highway as dedicated by the proprietors, and that the public have never by any act abandoned the same, or relinquished the same for the uses of a highway, then the plaintiff cannot recover.

And the court refused to give that instruction to the jury, and denied the same; and to that ruling and decision the defendant did duly except.

Whereupon the defendant asked the court further to instruct the jury that every owner of land has a right to dig upon his own ground in a reasonable manner, on reasonable notice, and with reasonable care, as deep as he needs or desires to, for the purpose of making the same more convenient or useful to himself; and he may so dig up to the very boundary line between his and his neighbor's possession; and even if his neighbor's land and improvements shall fall and his property be damaged thereby, no action can be maintained therefor.

And said county court then and there refused to give that instruction to the jury, and denied the same; and to that ruling and decision the defendant did then and there duly except.

And the defendant then asked the court further to instruct the jury as follows, to wit, that the defendant being the owner of the lot
123 or ground occupied by him, had a right to dredge carefully and deep enough to allow the passage of vessels up to the extension eastward of the center line of Point street, in front of his own lot, to the center or thread of the stream.

And the said court refused to give that instruction in that form and without addition, but gave the same in a modified and changed form by adding thereto that the defendant will be liable to his neighbor in damages, if from so dredging, injury shall follow to his neighbor's premises on the other side of the said line.

And to that ruling and decision, refusing the instruction so asked, as well as to the said modification and changed instruction as given, the defendant did then and there duly except.

The jury afterwards, being so instructed, returned a verdict for the plaintiff, and assessed his damages at $123 81; and because the aforesaid exceptions do not appear of record in said action, at the request of the defendant therein, the foregoing bill of exceptions has been upon due notice settled, and the same is signed and authenticated and made part of the record by the judge of said county court this 16th day of June, A. D. 1863.

ALBERT SMITH, [SEAL.]
County Judge.

It is agreed that the foregoing bill of exceptions, &c., is full and correct, and contains all the material testimony which is important to any exception therein stated, or to or upon the motion for a new trial. It is also agreed that the cause within entitled may be argued by the defend-
ant on appeal in supreme court, and a new trial asked with the same
124 advantages as though a motion for a new trial had been regularly made and overruled, and exception to that ruling taken by de-

fendant. It is also agreed that said case may be put on the calender for argument in the supreme court at the June term, 1863.

PETER YATES, *in pro. per.*
WELLS & BRIGHAM,
Att'ys for Def't.

125 State of Wisconsin.—County court, Milwaukee County.

PETER YATES
against
TRUMAN H. JUDD.

I, James Hickcox, clerk of said court, do hereby certify that I have compared the annexed printed case with the original complaint, answer, bill of exceptions; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office. I further certify that said complaint, answer, and bill of exceptions are the same papers that were used in the supreme court of this State, upon the appeal taken from this court to said supreme court in the above-entitled action, said originals having been returned to this court with the remittitur of said supreme court, and being now on file in this court.

In testimony whereof, I have hereto set my hand & affixed the seal of said court this 14th day of September, 1867.

[SEAL.] JAMES HICKCOX,
Clerk Circ't C't, Mil. Co., Wis.

(Indorsed:) Exhibit F. County court, Milwaukee County. Peter Yates vs. Truman H. Judd. Certified copy of record.
Filed Jan'y 4, 1868.

126 *Exhibit "G."*

Know all men by these presents that a mortgage, bearing date the 23rd day of June, A. D. 1848, from Wallace W. Graham and Clark Shepardson, to the undersigned, Alexander McDonald, recorded in the office of register of deeds, in the county of Milwaukee and State of Wisconsin, in volume I of Mortgages, on pages 182 and 183, on the 7th day of July, A. D. 1848, and the bond therein mentioned, and debt thereby secured, is fully paid, satisfied, and discharged. And the said Alexander McDonald, for and in consideration of one dollar to him paid by the said Graham and Shepardson, doth hereby grant, bargain, sell, convey, and confirm unto the said Graham and Shepardson, their heirs and assigns, forever, all the estate, right, title, and interest of him, the said Alexander McDonald, of, in, and to the property described in said mortgage, to wit: Lot thirteen, in block eighty-four; lot four, in block one hundred and forty-four; lots one and four, in block one hundred and fifty; lot seven, in block one hundred and fifty-seven; and lots one and two, in block one hundred and fifty-eight, situate in fractional lot six, of section twenty-nine, town. seven, range twenty-two, in the Fourth ward of the city of Milwaukee, county of Milwaukee, and State of Wisconsin, and of, in, and to the said fractional lot six.

In witness whereof, the said Alexander McDonald hath hereunto set his hand and seal at Danville, in the State of Illinois, this ninth day of January, A. D. eighteen hundred and fifty.

A. McDONALD. [SEAL.]

Signed, sealed, & delivered in the presence of—
O. L. DAVIS.
THOMAS SHORT.

STATE OF ILLINOIS, *Vermilion County, ss:*

I, Guy Merrill, one of the justices of the peace in and for said county, do hereby certify that the above-named Alexander McDonald, who is personally known to me to be the person whose name is subscribed
127 to the foregoing release of mortgage and deed as having executed the same, this day, in proper person, came before me and acknowledged that he signed, sealed, and delivered the said release of mortgage and deed for the uses and purposes therein mentioned, and as his free act and deed.

Given under my hand and seal this ninth day of January, A. D. eighteen hundred and fifty.

G. MERRILL, [SEAL.]
Justice of the Peace.

STATE OF ILLINOIS, *Vermilion County, ss:*

I, Samuel G. Craig, clerk of the circuit court of said county, being a court of record, do hereby certify that Guy Merrill, whose name is subscribed to the certificate of acknowledgment to the foregoing release of mortgage and deed, was, at the date thereof, a justice of the peace in and for said county; that I believe the signature of the said Guy Merrill subscribed thereto is genuine; and that said release of mortgage and deed is executed and acknowledged according to the laws of the State of Illinois.

In witness whereof, I have hereunto set my hand and seal of office and of said court this ninth day January, A. D. eighteen hundred and fifty.

[SEAL.] SAM'L G. CRAIG,
Clerk Vermilion Circuit Court.

(Endorsed:) Alexander McDonald to Clark Shepardson & Wallace W. Graham. Deed & release.

"Received for record this 5th Feb'y, 1850, at 2 o'c. p. m., and recorded in vol. 28 of Deeds, pages 532 & 533; 6| paid.

"A. McCORMICK, *Reg. Mil. Co.*"

"Received record this 5 Feb'y, 1850, at 2 o'c. p. m., and recorded in vol. L of Mortgages, pages 420 & 424; 6| paid.

"A. McCORMICK, *Reg. Mil. Co.*"

Exhibit "H."

This indenture, made the second day of June, in the year of our
128 Lord one thousand eight hundred and fifty-three, between Wallace W. Graham, of the city of Milwaukee, party of the first part, and Clark Shepardson, of the same place, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of sixteen hundred and fifty dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and, by these presents, doth give, grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all those pieces or parcels of land situate in the county of Milwaukee and State of Wisconsin, described and known as the undivided half of lots one (1) and two, (2,) in block one hundred and fifty-eight, (158,) in the Fourth ward of the city of Milwaukee, together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise apper-

taining, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, either in possession or expectancy of, in, and to the above-bargained premises, and their hereditaments and appurtenances, to have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part, and to his heirs and assigns forever. And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that, at the time of the ensealing and delivery of these presents, he is well seized of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law, in fee simple, and that the same are free and clear from all incumbrances whatever, and that the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns,
129 against all and every person or persons lawfully claiming the whole or any part thereof, he will forever warrant and defend.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

W. W. GRAHAM. [SEAL.]

Sealed and delivered in presence of—
EZRA HARRIS.
J. B. CROSS.

STATE OF WISCONSIN, *County of Milwaukee:*

Be it remembered that, on the second day of June, A. D. 1853, personally came before me the above-named Wallace W. Graham, to me known to be the person who executed the said deed, and acknowledged the same to be his free act and deed for the uses and purposes therein mentioned.

J. B. CROSS,
Notary Public Mil. Co.

(Endorsed:) Deed. W. W. Graham to Clark Shepardson. 2 June, 1853.

Received for record August 2d, A. D. 1853, at 3¼ o'clock p. m., and recorded in vol. 41 of Deeds, on page 63.

CHARLES J. KERN,
Register Milwaukee Cty, Wis.

Exhibit "I."

This indenture, made the twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty-six, between Clark Shepardson, of the city & county of Milwaukee, Wisconsin, and Lurinda, his wife, parties of the first part, and Peter Yates, of the same place, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of twenty-five thousand dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, and quitclaimed, and, by these presents, do give, grant, bargain, sell, remise, release, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all the following described real estate, situated in the county of
130 Milwaukee and State of Wisconsin, being all that certain piece or parcel of land in the Fourth ward of the city of Milwaukie, in

the county & State aforesaid, and described as follows, to wit: Commencing at a point in block No. 158, in said ward, on the south side of the Menomonee River, which is on a line with the present dock on the west side of the Milwaukee River next north of the Menomonee River, and running thence from said point on the present line of docking on the south side of the Menomonee River, easterly to the middle of the Milwaukie River; thence southerly with the center of said last-mentioned river to the section line; thence west on said section line to Point street; thence northwesterly along the north side of Point street, to a point on a line with the point of commencement and the present line of docking on the west side of the Milwaukee River, north of the Menomonee River; thence north on said last-mentioned line to the place of beginning, excepting, saving, & reserving to said Shepardson, his heirs and assigns, all the mud, sand, earth, and soil of the premises hereby conveyed that said Shepardson, his heirs or assigns, may desire to take for filling in the lots or ground owned by said Shepardson, adjoining said premises, provided said Yates, or his assigns, shall sell and convey the above-bargained premises to the city of Milwaukie, or any other person or persons, for the purpose of being dredged out & made navigable. And this grant is made upon the express condition in that event, that the said city of Milwaukie, or other grantee of said Yates, or his assigns, for that purpose, build upon the west line of the premises hereby conveyed a good and substantial dock within ninety days after such conveyance, and within the same time dredge out to navigable depth for the space of fifty feet east of said line, and deposit the mud, sand, & soil so dredged out upon the premises of said Shepardson next
131 adjoining west of the premises hereby conveyed, at the sole expense of such grantee or grantees. And provided further, that this conveyance shall not operate to prejudice the interest and rights of property that said Shepardson now has to the dock & ground next west of the premises hereby granted, except, of course, the right and privilege of docking, dredging out, and making a water front on the Milwaukee River, which is hereby granted to said Yates, his heirs & assigns.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CLARK SHEPARDSON. [SEAL.]
LURINDA SHEPARDSON. [SEAL.]

Signed, sealed, and delivered in presence of—
P. C. HALE.
H. F. SHEPARDSON.

STATE OF WISCONSIN, *Milwaukie County, ss:*

Be it remembered that on this twenty-sixth day of May, A. D. 1856, the said Clark Shepardson, & Lurinda, his wife, who were to me personally known, appeared before me and acknowledged the foregoing instrument to be their free act and deed, for the uses and purposes therein contained.

P. C. HALE,
Notary Public, Milwaukee County, Wisconsin.

(Endorsed:) Clark Shepardson & wife to Peter Yates. Quitclaim deed.

"Received for record May 27th, 1856, at 8 o'clock a. m., and recorded in vol. 52 of Deeds, on pages 334 & 335."

CHARLES T. KERN,
Reg. of Deeds of Milw. Co. Wis.,
By J. A. LIEBHABER, *Dep'ty.*

132 *Exhibit "J."*

This indenture, made the sixteenth day of August, in the year of our Lord one thousand eight hundred and sixty-four, between Peter Yates and Mary A. Yates, his wife, of the town of Lake, county of Milwaukie, & State of Wisconsin, parties of the first part, and Rynier V. Yates, of the city of Utica, county of Oneida, and State of New York, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and, by these presents, do give, grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part, his heirs and assigns forever, all the following described real estate situated in the Fourth ward of the city of Milwaukie, county of Milwaukie & State of Wisconsin, particularly described as follows, to wit: Commencing at a point in block No. 158, in said ward, on the south side of the Menomonee River, which is on a line with the dock, on the west side of the Milwaukie River, next north of the Menomonee River, as said dock was on the 22d day of May, 1856, and running thence from said point on the present line of docking on the south side of the Menomonee River easterly to the middle of the Milwaukie River; thence southerly with the center of said last-mentioned river to the section line; thence west on said section line to Point street; thence northwesterly along the north side of Point street to a point on a line with the point of commencement and the line of docking on the west side of the Milwaukie River, north of the Menomonee River, as it was on the said 22d day of May, 1856; thence north on said last-mentioned line to the place of beginning, together with all and singular the hereditaments and appurtenances thereunto belonging,
or in any wise appertaining, and all the estate, right, title, in-
133 terest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, either in possession or expectancy, of, in, and to the above-bargained premises, and their hereditaments and appurtenances, to have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In trust nevertheless, and for the uses and purposes following, to wit, that the said party of the second part take possession and charge of the said premises, collect and receive the rents, issues, and profits thereof, & out of the same pay the taxes thereon accrued, & that may accrue pending this trust; and that he proceed, as speedily as possible, to sell and convey the said premises, either at public or private sale, and convert the same into money, and out and with the nett proceeds of such sale or sales to pay off and discharge, or procure to be released and cancelled, all liens and incumbrances that may be upon said premises or any part thereof, and out of the residue of the nett proceeds of such sale or sales, if any, to reimburse to himself, and retain and apply the sum of five thousand one hundred and eighty-eight dollars, with

interest at the rate of twelve per cent. per annum from the 13th day of January, A. D. 1851, due to the said party of the second part from said Peter Yates, of the first part; and by and with the residue of said nett proceeds, if any, to pay all the other creditors of said Peter Yates, of the first part, their respective debts in full, if said residue be sufficient, and if insufficient, to pay them pro rata; and lastly, after fully discharging the above trusts, if there shall remain any surplus of said nett proceeds, to pay or deliver the same to Captain Theodore Yates, (son of said Peter Yates,) in full discharge of the above-reposed trust.

And the said Peter Yates, for himself, his heirs, executors, and administrators, doth covenant, grant, bargain, and agree, to and
134 with the said party of the second part, his heirs & assigns, that at the time of the ensealing and delivery of these presents, that he is well seized of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and that he will save the said party of the second part, his heirs, executors, and administrators, from being damaged, or sustaining any loss or injury in any way whatever, by well and faithfully executing the powers and trusts hereby created and given to him.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

PETER YATES. [SEAL.]
MARY A. YATES. [SEAL.]

Sealed and delivered in the presence of—
ELLIS WORTHINGTON.
AMOS WAKELIN.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Be it remembered that on the thirteenth day of August, A. D. 1864, personally came before me, the above-named Peter Yates and Mary A. Yates, his wife, to me known to be the persons who executed the foregoing deed, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

ELLIS WORTHINGTON,
Notary Public, Mil. Co., Wis.

(Endorsed:) Peter Yates and wife to Rynier V. Yates. Trust deed.

REGISTER'S OFFICE, MILWAUKEE COUNTY, *Wisconsin:*

Recorded December 18, A. D. 1864, at 1½ p. m., in volume eighty-seven of Deeds, on pages 187, 188, & 189.

F. BAGGELER,
Register, Milwaukee Co., Wis.

Exhibit "K."

At a circuit court holden at the city of Milwaukee in and for the county of Milwaukee, on the third Monday in September, in the year of our Lord one thousand eight hundred and fifty-six:

STATE OF WISCONSIN, *Milwaukee County, to wit:*

135 The jurors of the grand jury, good and lawful men of the said county of Milwaukee, being duly elected, empanneled, sworn, and charged to inquire for the State of Wisconsin, and [and] for the body of the

county of Milwaukee aforesaid, do, upon their oath, present that the Milwaukee River, that is to say, that a certain part of said river lying and being in the city and county of Milwaukee aforesaid, in and from the time whereof the memory of man is not to the contrary, hath been an ancient and public river, and a common highway for all the citizens of said State, with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, run, pass, repass, and labor, at their will and pleasure, without any impediment or obstruction whatever, and the jurors aforesaid, upon their oath aforesaid, do further present that Peter Yates, late of the city of Milwaukee, in said county, attorney and counsellor at law, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-six, and on divers other days, between that day and the day of the taking of this injunction, with force and arms, at the city and county aforesaid, unlawfully, wilfully, and injuriously did put, place, and drive into the bed of said river a large number of sticks of timber, piles, and logs for the purpose of erecting therein a dock; and that he, the said Peter Yates, on the said first day of July, in the year last aforesaid, and on divers other days and times between that day and the day of the taking of this injunction, with force and arms, at the city aforesaid, in the county aforesaid, in the said river and common highway, then the said sticks of timber, piles, and logs, unlawfully, wilfully, maliciously, and injuriously, did continue, and still doth continue, so put, placed, and driven into the bed of said river and highway, as aforesaid, by means whereof the navigation and free passage of, in, through, along, and upon the said river and common highway, on the day and year aforesaid, and on the said
136 other days and times, hath been, and still is, greatly straitened, obstructed, and confirmed, to wit, at the city and county of Milwaukee aforesaid, so that the citizens of said State, navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river and common highway there, on the same day and year aforesaid, and on the said other days and times, could not, nor yet can, go, navigate, sail, row, pass, repass, and labor with their ships, barges, lighters, boats, vessels, and wherries upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and common highway there in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed, to do, to the great damage and common nuisance of all the good and citizens of this State, navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, and along the said Milwaukee River and common highway there, to the great obstruction to the trade and navigation of and upon the said river, to the evil example of all others in the like case offending, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the first day of July aforesaid, and on the said other days and times between that day and the day of the taking of this inquisition, the said Peter Yates, at the city of Milwaukee, in said county of Milwaukee, unlawfully, wilfully, and injuriously did put and place a certain obstruction, to wit, piles, sticks of timber, framework, and logs in the channel of the Milwaukee River there, the said river then and there being a public and navigable river and common highway for the citizens of said State, with their ships, barges, lighters, boats, wherries, and other vessels to navigate, sail, pass, repass, run, and labor at
137 their will and pleasure, without any impediment or obstruction

whatever, and that he, the said Peter Yates, on the said first day of July, and the said other days and times, with force and arms, at the city aforesaid, in the county aforesaid, in the said navigable and public river and common highway, the said obstruction, to wit, the said piles, logs, sticks of timber, and framework in the channel of said river, unlawfully did continue, and still doth continue, so erected, placed, and put in the said river and common highway, as aforesaid, by means whereof the navigation of, in, through, and along the said river and common highway, on the day and year aforesaid, and on the said other days and times, hath been, and still is, greatly straitened, obstructed, and confined, to wit, at the city aforesaid, in the county aforesaid, so that the good citizens of the State, navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, and along the said river and common highway there, on the same day and year aforesaid, and on the said other days and times, could not, nor yet can go, navigate, sail, row, pass, repass, and labor with their ships, boats, barges, lighters, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and common highway there, in so free and uninterrupted a manner as of right they ought and before have been used and accustomed to do, to the great damage and common nuisance of all the good citizens of the State, navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, and along the said river and common highway there, to the great obstruction to the trade and navigation of, and upon, the said river, to the evil example of all others in like case offending, and against the peace and dignity of the State of Wisconsin.

138 And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the said first day of July, and the said other days and times, the said Peter Yates, at the city of Milwaukee, in the county of Milwaukee, with force and arms, unlawfully, wilfully, and injuriously did erect, raise, and place, and cause to be erected, raised, and placed, a certain embankment composed of wood, earth, rubbish, and other materials, of great length and width, to wit, of the length of one hundred and fifty feet and of the width of fifty-five, in the channel and upon the bed of the Milwaukee River aforesaid, then being, the said river then and there being a public and navigable river and common highway for all the good citizens of the State with their ships, vessels, boats, and other craft to pass, repass, and navigate at their will and pleasure; and the said embankment so as aforesaid erected in the said river, on the said first day of July, and on the other days and times aforesaid, then and there unlawfully, wilfully, and injuriously did continue, and still does continue, by reason whereof the good citizens of the State, during all the time aforesaid, could not, nor can they now, pass, repass, and navigating with their ships, vessels, boats, and craft, in and along the said river and common highway, then, as they were before accustomed to do, and still of right ought to do, without great peril of their lives, and the destruction and loss of their ships, vessels, and craft; to the great damage and common nuisance of all the good citizens of the State in and along the said river and common highway, passing, repassing, rowing, and navigating with their ships, vessels, boats, and craft as aforesaid; to the evil example of all others in the like case offending, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present

that that part of the Milwaukee River which passes, runs, and flows in, through, and along the city of Milwaukee, in said county of Mil-
139 waukee, is and, from time whereof the memory of man runneth not to the contrary, has been an ancient and common highway and navigable river, for all the citizens of the State with their ships, vessels, crafts, wherries, and boats to sail, run, navigate, pass, and repass and safely to convey their wares and merchandize together with themselves, their mariners, and passengers on board the same, to either bank of the said river at their free will and pleasure, and that the said Peter Yates afterwards, to wit, on the said first day of July, in the year of our Lord one thousand eight hundred and fifty-six, and on the said other days and times, with force and arms at the Fourth ward of the city of Milwaukee in said county of Milwaukee, in the said navigable river and common highway, in and upon the bed and soil thereof, and in the stream and water way thereof, unlawfully, injuriously, wilfully and knowingly did erect, raise, and place, and cause to be erected, raised, and placed, a certain embankment composed of wood, stone, earth, and other materials, and commonly called a wharf, of great length, to wit, of the length of one hundred feet and more, along the said river and common highway, and of the width of fifty feet and more, across and athwart the stream and water way thereof, and the said wharf so as aforesaid erected, raised, and placed, in the said river and common highway there, from the said first day of July until the taking of this inquisition, at the ward, city, and county aforesaid, by the said Peter Yates, then and there unlawfully, wilfully, and injuriously did continue, and still does continue, by reason whereof the good citizens of the State, during all the time aforesaid, could not, nor can they now, pass, repass, and navigate with their ships, boats, vessels, and craft, in and along the said river and common highway there, as they before used and were accustomed to do, and still of right ought to do, without great peril to their lives, and the destruction and loss of their ships, vessels, and
140 craft, to the great damage and common nuisance of all the citizens of the State, passing, repassing, and navigating with their ships, vessels, boats, and craft, in, along, and upon the said river and common highway; to the evil example of all others in the like case offending and against the peace and dignity of the State.

JAS. A. MALLORY, *Dist. Att'y.*

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, James Hickcox, clerk of said court, do hereby certify that the annexed copy is a correct transcript of the original indictment found in the action therein entitled, and of the whole thereof, as the same remains of record in my office.

I further certify that the defendant was arraigned under said indictment and plead not guilty. And trial by jury and verdict of not guilty, and defendant discharged, February 26, 1857.

In testimony whereof, I have hereto set my hand and affixed the seal of said court this 9 day of November, A. D. 1867.

[SEAL.] JAMES HICKCOX,
Clerk Circuit Court, Milwaukee County, Wisconsin.

Exhibit "L."

At a circuit court holden at the city of Milwaukee, in and for the county of Milwaukee, on the third Monday in April, in the year of our Lord one thousand eight hundred and fifty-seven:

STATE OF WISCONSIN, *Milwaukee County, to wit:*

The jurors of the grand jury, good and lawful men of the said county of Milwaukee, being duly elected, empanneled, sworn, and charged to inquire for the State of Wisconsin, in and for the body of the
141 county of Milwaukee aforesaid, do upon their oath present, that the Milwaukee River, that is to say, that a certain part of said river lying and being in the city of Milwaukee, in said county, is, and from the time whereof the memory of man is not to the contrary, hath been an ancient and public river, and a common highway for all the citizens of said State, with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, run, pass, repass, and labor at their will and pleasure, without any impediment or obstruction whatever.

And the jurors aforesaid, upon their oath aforesaid, do further present that Peter Yates, late of the city of Milwaukee, in said county, attorney and counsellor at law, on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and fifty-six, and from thence continually, until the day of the taking of this inquisition, at the city aforesaid, in the county aforesaid, a certain wharf composed of earth, timbers, framework, rubbish, and other materials, of great length and width, to wit, of the length of one and fifty feet, and of the width of fifty feet, before that time placed, put, and erected in the said part of the said river, in the city and county aforesaid, in the common highway aforesaid, then obstructing, straitening, and confining the navigation and free passage through, on, and upon the part of said river aforesaid, unlawfully, wilfully, and injuriously did continue, and still doth continue, so placed, put, and erected as aforesaid, in the said river and common highway, so that by means thereof the navigation of, in, through, and along the said river and common highway, on the day and year aforesaid, and from thence continually, until the day of the taking of this inquisition, hath been and still is greatly straitened, obstructed, and confined, to wit, at the city aforesaid, in the county aforesaid, so that the good citizens of the State navigating, sailing, rowing,
142 passing, repassing, and laboring until their ships, barges, lighters, boats, and other vessels, in, through, and along the said river and common highway then, on the day and year aforesaid, and from thence continually, until the day of the taking of this inquisition, could not, nor yet can go, navigate, run, pass, repass, and labor with their ships, boats, barges, lighters, and other vessels, upon and about their necessary business and affairs, in, through, along, and upon the said river and common highway, then, in so free and uninterrupted a manner, as of right they ought and before that time had been used and accustomed to do; to the great damage and common nuisance of all the good citizens of the State, navigating, sailing, rowing, passing, and repassing with their ships, barges, lighters, and other vessels in, through, and along the said river and common highway, there to the great obstruction to the trade and navigation of and upon said river to the evil example of all others in the like case offending and against the peace and dignity of the State of Wisconsin.

And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-four, the city of Milwaukee caused and procured to be put and deposited in and upon the bed of the said part of the Milwaukee River and common highway, in the city and county aforesaid, a large quantity of earth, and thereby, then, and there, in the bed and channel of said river raised and created a large embankment, whereby and by means whereof that part of said river and com-

mon highway was then and there rendered unnavigable; and that afterwards, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-six, the said Peter Yates then and there unlawfully took possession of said embankment, and added to and increased the same by depositing earth thereon, and then and there upon said embankment, so as aforesaid created, made, added to, and increased, in the said part of the Milwaukee River, unlawfully did
143 erect, make, and construct a wharf composed of timbers, framework, stone, earth, and other materials of the length of one hundred and fifty feet and of the width of fifty feet; by means of which said wharf the free navigation, in, through, and over the said part of said river there, was then and there obstructed and generally impaired.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and fifty-six, and from thence continually until the day of the taking of this inquisition, the said Peter Yates, at the city and county aforesaid, so as aforesaid constructed and erected in the channel and upon the bed of said river, there obstructing, straitening, and impairing the navigation and free passage of, in, through, along, and upon the said part of the said river and common highway, unlawfully and injuriously did continue and still doth continue, so that the citizens of the State, during all the time aforesaid, navigating, sailing, rowing, passing, and repassing with their ships, barges, lighters, boats, and other vessels, in, through, along, and upon the said part of the river aforesaid, could not, and yet cannot, navigate, sail, row, pass, and repass with their ships, barges, lighters, boats, and other vessels upon their lawful business, in, through, along, and upon the said part of the river aforesaid, so safely and in so commodious and convenient a manner as of right they ought, and before had been accustomed to do, to the great damage and common nuisance of all the citizens of the State, navigating, sailing, rowing, passing, and repassing with their ships, boats, barges, and other vessels, in, through, along, and upon the said part of said river and common highway there, or having occasion so to do, to the great obstruction to the trade and navigation of and upon said river, to the evil example of all others in the like case offending, and against the peace and dignity of the State of Wisconsin.

And the jurors aforesaid, upon their oath aforesaid, do further
144 present that the Milwaukee River, that is to say, that a certain part of said river, lying and being in the city and county of Milwaukee aforesaid, in and from the time whereof the memory of man is not to the contrary, hath been an ancient and public river, and an arm of Lake Michigan, in and through which the waters of said lake flow and reflow, and that the same, during all that time, has been, and still is, a common highway for all the citizens of the State, with their ships, barges, boats, and other vessels to navigate, sail, row, pass, repass, and labor, at their will and pleasure, without any impediment or obstruction whatever. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Peter Yates on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and fifty-six, and from that day continually until the day of the taking of this inquisition, a certain wharf composed of timbers, framework, stone, earth, and other materials of the length of one hundred and fifty feet and of the width of fifty feet, which, before that time, had been erected, constructed, and built partly by certain persons to the jurors unknown, and partly by the said Peter Yates, in the channel and upon the bed of the said part of said river, in the city and county aforesaid, and in the said com-

mon highway, then, obstructing, straitening, and making dangerous the navigation and free passage, of, upon, and along said part of said river and common highway then, unlawfully, wilfully, and injuriously did keep and continue, and still doth keep and continue, so that the good citizens of the State, during all the time aforesaid, navigating, sailing, rowing, passing, repassing, and laboring with their boats, barges, lighters, and other vessels, in, through, along, and upon the said part of said river and common highway then, during all that time, could not, and yet cannot, navigate, sail, row, pass, or repass upon their lawful and necessary business and affairs, in, through, along, and upon the said part of said river and common
145 highway, so safely and conveniently as of right they ought, and before that time, had been accustomed to do, to the great danger, damage, and common nuisance of all the good citizens of the State, navigating, sailing, rowing, passing, repassing, and laboring with their ships, boats, barges, and other vessels, in, through, along, and upon the said part of said river and common highway then, or having occasion so to do, to the great obstruction and hindrance of the trade and navigation of and upon the said part of said river and common highway then, in contempt of the laws of the State, to the evil example of all others in the like case offending, and against the peace and dignity of the State of Wisconsin.

JAS. A. MALLORY, *Dist. Att'y.*

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, James Hickcox, clerk of said court, do hereby certify that the foregoing is a correct transcript of the original indictment entered in the action therein entitled, and of the whole thereof, as the same remains of record in my office.

I further certify that the defendant was arraigned upon said indictment, and thereto plead former trial and acquittal, and plaintiff demurred; demurrer overruled, and judgment for the defendant entered upon his plea October 24, 1857.

In testimony whereof, I have hereto set my hand and affixed the seal of said court this 9 day of November, 1867.

[SEAL.] JAMES HICKCOX,
Clerk Circuit Court, Milwaukee County, Wisconsin.

146 *Exhibit "M."*

At a term of the municipal court begun and holden at the city of Milwaukee, in and for the city and county of Milwaukee, on the first Monday in July, in the year of our Lord one thousand eight hundred and sixty-three:

STATE OF WISCONSIN, *Milwaukee County, ss:*

The jurors of the grand jury, good and lawful men of the said county of Milwaukee, being then and there duly elected, empanneled, sworn, and charged to enquire for the State of Wisconsin, in and for the body of the county of Milwaukee aforesaid, do, upon their oath, present that the Milwaukee River; that is to say, that a certain part of said river, lying and being in the Fourth ward of the city of Milwaukee, in said county, near the junction of the Menominee River with the Milwaukee River aforesaid, is, and from the time whereof the memory of man is not to the contrary, hath been, an ancient and public river, and a common

highway for all the citizens of said State, with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, run, pass, repass, and labor at their will and pleasure, without any impediment or obstruction whatever.

And the jurors aforesaid, upon their oath aforesaid, do further present that Peter Yates, late of the city of Milwaukee, in said county, attorney and counsellor at law, on the first day of September, in the year of our Lord one thousand eight hundred and fifty-seven, and from thence continually until the day of the taking of this inquisition at the city aforesaid, in the county aforesaid, a certain wharf, composed of earth, timber, framework, rubbish, and other materials of great length and width, to wit, of the length of one hundred and fifty feet, and of the width of one hundred feet, before that time unlawfully put and erected in the said part of the said river, in the city and county aforesaid, in the common highway aforesaid, there obstructing, straightening, and confining the navigation and free passage through, on, and upon the part of
147 said river aforesaid, unlawfully, wilfully, and injuriously did continue, and still doth continue, so placed, put, and erected, as aforesaid, in the said river and common highway, so that by means whereof the navigation of, in, through, and along the said river and common highway, on the day and year aforesaid, and from thence continually until the day of the taking of this inquisition, hath been, and still is, greatly straightened, obstructed, and confined, to wit, at the city aforesaid, in the county aforesaid, so that the good citizens of the State navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, and other vessels, in, through, and along the said river and common highway there, on the day and year aforesaid, and from thence continually until the day of the taking of this inquisition, could not, nor yet can go, navigate, run, pass, repass, and labor with their ships, boats, barges, lighters, and other vessels upon and about their necessary business and affairs in, through, along, and upon the said river and common highway there in so free and uninterrupted a manner as of right they ought, and before that time had been used and accustomed to do, to the great damage and common nuisance of all the good citizens of the State navigating, sailing, rowing, passing, and repassing with their ships, barges, lighters, and other vessels in, through, and along the said river and common highway there, to the great obstruction of the trade and navigation of, and upon, said river, to the evil example of all others in the like case offending, contrary to the form of the statute in such case made & provided, and against the peace and dignity of the State of Wisconsin.

And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-four, the city of Milwaukee unlawfully and wrongfully caused and procured to be put and deposited in and upon the bed of the said part of the Milwaukee River and common highway, in the city and county aforesaid, a large quantity of
148 earth, and thereby, then and there, in the bed and channel of said river, unlawfully raised and created a large embankment, whereby, and by means whereof, that part of said river and common highway was then and there rendered unnavigable; and that afterwards, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-six, the said Peter Yates then and there unlawfully took possession of said embankment, and added to and increased the same by depositing earth thereon, and then and there, upon said embankment so as aforesaid, created, made, added to,

and increased, in the said part of the Milwaukee River, unlawfully did erect, make, and construct a wharf, composed of timbers, framework, stone, earth, and other materials of the length of one hundred and fifty feet, and of the width of one hundred feet, by means of which said wharf the free navigation in, through, and over the said part of said river there, was then and there obstructed and generally impaired.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the first day of September, in the year of our Lord one thousand eight hundred and fifty-seven, and from thence continually until the day of the taking of this inquisition, the said Peter Yates, of the city and county aforesaid, the embankment and wharf aforesaid, so as aforesaid constructed and erected in the channel, and upon the bed of said river then obstructing, straightening, and impairing the navigation and free passage of, in, through, along, and upon the said part of said river and common highway, unlawfully and injuriously did continue, and still doth continue, so that the citizens of the State, during all the time aforesaid, navigating, sailing, rowing, passing, and repassing with their ships, barges, lighters, boats, and other vessels in, through, along, and upon the said part of the river aforesaid, could not, and yet cannot, navigate, sail, row, pass, and repass with their ships, barges, lighters, boats, and other vessels, upon their lawful business, in, through, along, and upon the said part
149 of the river aforesaid so safely, and in so commodious and convenient a manner as of right they ought, and before had been accustomed to do, to the great damage and common nuisance of all the citizens of the State navigating, sailing, rowing, passing, and repassing with their ships, boats, barges, and other vessels in, through, along, and upon the said part of the said river and common highway there, or having occasion so to do, to the great obstruction of the trade and navigation of and upon said river, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Wisconsin.

And the jurors aforesaid, upon their oath aforesaid, do further present that the Milwaukee River; that is to say, that a certain part of said river lying and being in the Fourth ward of the city of Milwaukee, in the county of Milwaukee aforesaid, near the junction of the Menominee River with the Milwaukee River aforesaid, in and from the time whereof the memory of man is not the contrary, hath been an ancient and public river, and an arm of Lake Michigan, in and through which the waters of said lake flow and reflow, and that the same, during all that time, has been, and still is, a common highway for all the citizens of the State with their ships, barges, boats, and other vessels to navigate, sail, row, pass, and repass, and labor at their will and pleasure, without any impediment or obstruction whatever.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Peter Yates, on the first day of September, in the year of our Lord one thousand eight hundred and fifty-seven, and from that day continually until the day of the taking of this inquisition, a certain wharf, composed of timbers, framework, stone, earth, and other materials, of the length of one hundred and fifty feet, and of the width of one hundred feet, which before that time had been unlawfully
150 erected, constructed, and built, partly by a certain person to the jurors unknown, and partly by the said Peter Yates, in the channel, and upon the bed of the said part of said river, in the Fourth ward of the city of Milwaukee, in the county aforesaid, and in the said com-

mon highway, there obstructing, straitening, and making dangerous the navigation and free passing of, upon, and along said part of said river and common highway, there unlawfully, wilfully, and injuriously did keep and continue, and still doth keep and continue, so that the good citizens of the State, during all the time aforesaid, navigating, sailing, rowing, passing, repassing, and laboring with their boats, barges, lighters, and other vessels in, through, along, and upon the said part of said river and common highway there, during all that time could not, and yet cannot, navigate, sail, row, pass, or repass upon their lawful and necessary business and affairs in, through, along, and upon the said part of said river and common highway, so safely and conveniently as of right they might, and before that time had been accustomed to do, to the great damage, danger, and common nuisance of all the good citizens of the State navigating, sailing, rowing, passing, repassing, and laboring with their ships, boats, barges, and other vessels in, through, along, and upon the said part of said river and common highway there, or having occasion so to do, to the great obstruction and hindrance of the trade and navigation of and upon the said part of said river and common highway there, in contempt of the laws of the State, to the evil example of all others in like case offending, and against the peace and dignity of the State of Wisconsin.

S. PARK COON,
District Attorney of Milwaukee County, Wisconsin.

A true bill:

HAVEN POWERS, *Foreman.*

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

151 I, James Hickcox, clerk of said court, do hereby certify that the annexed copy is a correct transcript of the original indictment found in the action therein entitled, and of the whole thereof, as the same remains of record in my office.

I further certify that the defendant, being arraigned thereon, plead former trial and acquittal, and the plaintiff demurred to the def't's pleas; that the demurrer was overruled, and leave given the plaintiff to reply. Reply filed, and trial had upon replication and pleas by jury, and upon trial the jury found for the defendant, and defendant was discharged by the court September 25, 1864.

In testimony whereof, I have hereto set my hand and affixed the seal of said court this 9 day of November, 1867.

[SEAL.] JAMES HICKCOX,
Clerk Circuit Court Milwaukee County, Wisconsin.

Ordinance dock line of 1863.

"Also commencing at a point on the present dock line on the south side of the Menomonee River, which is south 27½ degrees west from the corner of the docks, on the north side of said river, at its intersection with the Milwaukee River, thence running southerly in a direct line to a point on the north line of Point street as extended, distant one hundred and forty-two (142) feet easterly from and at right angles with the east line of Reed street."

STATE OF WISCONSIN,
County and City of Milwaukee, ss:

I, Edward Mahoney, clerk of said city, do hereby certify that the

foregoing is a true copy as compared by me with the original on file in the clerk's office of said city, of the ordinance dock line on the west side of the Milwaukee River, and between the Menomonee River, and the north line of Point street, in the Fourth ward of said city, passed
152 October 5, 1863; approved October 8th, 1863; and still in force, & the whole thereof, in respect of said premises.

In testimony whereof, I have hereunto signed my name officially & affixed the seal of my said office this 29th day of October, A. D. 1868.

[SEAL.] EDWARD MAHONEY,
City Clerk.

Exemplification of record.

THE CITY OF MILWAUKEE
vs.
PETER YATES AND CLARK SHEPARDSON. } Exemplification of record.

Pleas before the Honorable Alexander W. Randall, judge of the second judicial circuit of the State of Wisconsin, and presiding judge of the circuit court within and for the county of Milwaukee and said State, at a term of said court begun and holden at the court-house in the city of Milwaukee, on the third Monday of September, A. D. 1856—Samuel S. Conover, sheriff; Matthew Keenan, clerk.

THE CITY OF MILWAUKEE
vs.
PETER YATES AND CLARK SHEPARDSON.

Be it remembered that heretofore, to wit, on the 8th day of October, 1856, came the said complainant, by its solicitor, and filed in the office of the clerk of the court aforesaid, and filed its bill of complaint in the words and figures following, to wit:

In chancery.

To the circuit court of Milwaukee County:

Your orator, the City of Milwaukee, a municipal corporation under the laws of the State of Wisconsin, complaining, shows unto this court that the area hereinafter described is, and from time immemorial has been, a part of the Milwaukee River, namely, that portion of section twenty-nine, in the Fourth ward of said city, bounded east by the east line of said ward, south by the south line of said section, west by
153 the east line of Reed street, and north by the southwesterly line of Point street, and a straight line running northeasterly from the eastern termination of the south line of Point street to the northeast corner of lot one in block one hundred and fifty-eight in said ward, at a point one hundred and forty feet east from Reed street, and a line running due east from the northeast corner of said lot one to the east line of said ward; that partition of lot six in said section was made by the district court of said county, at the November term thereof, in the year one thousand eight hundred and thirty-seven, among the several owners thereof, awarding to their respective interests therein as adjudged to them by said court; that the commissioners appointed by said court to make said partition, caused a plat to be made of said lot six, by which said lot six was divided into town lots, streets, alleys, and public grounds, and made partition between the respective owners of said lot six by

assigning to them respectively specific town lots, represented on said plat, in lieu of their undivided interests in said lot six, and made return of their said partition to said district court, of which the said plot formed a part, which return was confirmed by the said district court, and that partition so made and confirmed has been further confirmed, as your orator is informed and believes, by the said original proprietors; that about the same time, when said partition was so confirmed by said district court, all the then proprietors of said lot six, as your orator is informed and believes, made and duly acknowledged a town plat of said lot six similar in all respects to the plat confirmed by said court, which plat of said proprietors was filed in the office of the register of deeds of said county for record, but not having been recorded has since been taken from said office; that the proprietors of said lot six by the said plat, and their subsequent conveyances in conformity thereto, your orator submits, have dedicated for public use forever all that
154 part of the said area above described, which was not navigable for the largest class of vessels used in navigating the Milwaukee River, as a water basin to be used for the purposes of navigation in connection with the adjoining more navigable portions of said river, including the said area and for a long distance above and below the same, until the encroachments and obstructions hereinafter mentioned were made, was, and from time immemorial hath been, a common highway for all the citizens of this State to pass and repass with their boats, vessels, and other water craft at their free will and pleasure, without lawful let or hindrance of any kind, as well without as in consequence of the aforesaid dedication of said partition of said area.

Your orator further shows that by the act of the legislature of the State of Wisconsin, approved Feb. 20th, 1852, known as the city charter, the street commissioners of the different wards of the city of Milwaukee were authorized and empowered to regulate and alter wharves along the banks of the Milwaukee and Menominee Rivers, and to have and exercise the same power and control over said rivers as over streets and alleys, and to have power to cause said Milwaukee River to be dredged so as to make the same more navigable; that by act of said legislature amendatory of said first-named act, approved March 31, 1859, the common council of said city were authorized and empowered by ordinance to establish dock and wharf lines upon the banks of the Milwaukee and Menominee Rivers, to restrain and prevent encroachments upon said rivers and obstruction thereto; that in pursuance of the authority thus given, the common council of said city did on the eighth day of June, one thousand eight hundred and fifty-five, pass an ordinance, of which due publication was made as required by law, establishing a dock line across the above-described area, commencing at the northeast corner of said lot, and in said block 158, at a point one hundred and forty feet east from Reed street, and thence running parallel with Reed street to the line dividing the Fourth and Fifth wards of said city, thereby
155 impliedly giving the consent of said city to individuals to use for private purposes that portion of said area lying west of said dock line, and forbidding and making unlawful any obstructions or encroachments on that portion of said area lying east of said dock line.

Your orator further shows that by law said city of Milwaukee is made the conservator as well of that part of the Milwaukee River as of all streets, alleys, and public grounds within the limits of said city, and that it is the duty of said city to protect said river within the city limits, by dock lines, from all obstructions and encroachments, and that said dock line was established by ordinance as aforesaid, below low-water mark, on the bank of said river.

And your orator further shows that Peter Yates and Clark Shepardson, not regarding the rights of the public, nor the dock line thus established, have taken exclusive possession, as hereinafter mentioned, of that portion of said area situated east of said dock line and bounded as follows: "Beginning at the northeast corner of said lot one in said block 158, at a point one hundred and forty feet east from Reed street, thence running south 62° 10′ east one hundred and eighty-eight $\frac{90}{100}$ feet, thence south 17° 30′ west one hundred and six $\frac{8}{10}$ feet, thence north 63° 50′ west one hundred and fifty-two $\frac{78}{100}$ feet to said dock line, thence north on said dock line one hundred and twenty $\frac{86}{100}$ feet to the place of beginning; and that said Yates and Shepardson have commenced the construction of a wharf occupying all that portion of said river so taken possession of by them, and for the purpose of constructing said wharf have driven piles close together in the bed of said river for the whole length of the northerly and easterly lines of the part of said river so taken possession of by them, and have placed timbers on said piles, and threaten to complete said wharf by driving more piles into the bed of the river so taken possession of by them, by placing more timbers thereon and by filling dirt into the same and otherwise; that the
156 construction of that part of said wharf on the west eighty-four feet, or thereabouts, of the north line of the area last described, with the rear bounded on the east by a line at right angles, or nearly so, with said north line, was commenced by said Shepardson within the last 3 or 4 years, and the construction of the residue of said wharf was commenced within the last two or three months, ostensibly by the said Peter Yates, but as your orator believes and charges, in reality for the benefit of himself and the said Shepardson, and that there was and is a secret understanding between the said Yates and Shepardson that they are or were to be jointly interested in the said last-mentioned part of said wharf, if not in the whole of the same; that said part of said wharf, the construction of which has been commenced by said Yates, is a continuation of the part commenced by said Shepardson, and that both portions of said wharf are in about the same state of progress as to completion.

Your orator further shows that said wharf is a very great encroachment upon said river, and obstruction in & thereto, and if allowed to be completed and continued will cause irreparable injury, not only to the inhabitants of said city, but also to the rights of the citizens of this State and of the United States; and your orator is informed and believes that the only right or claim which said Yates and Shepardson pretend to have to that portion of said river and ground where said wharf is located is by virtue of the ownership under said partition of said lot one in block 158, adjoining said wharf, when in fact the original proprietors of said lot one, long before said Yates & Shepardson had any interest in the same, had, as before stated, dedicated their interest to the public use, if they ever had any, in that portion of said river.

Your orator therefore prays that said Yates and Shepardson may be made parties defendants to this suit, and to the end, therefore, that they may, if they can, show why your orator should not have the relief hereby prayed for, that said defendants may upon their several corporate oaths, according to the best and utmost of their respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to all and singular the premises herein set forth, and that on the final hearing of this cause said defendants may be perpetually enjoined and restrained from building said wharf, and from fur-
157 ther in any way progressing with the work thereon, and that your

orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your orator the writ of injunction issuing out of and under the seal of this court, to be directed to the said Peter Yates and Clark Shepardson, their agents, attorneys, servants, and workmen, therein and thereby restraining them, and each of them, from driving any more piles and placing timbers thereon, and from filling in any dirt or other material, or in any other way obstructing or interfering with, until the final hearing of this cause, any part of that portion of the Milwaukee River within the following bounds: Beginning at the northeast corner of lot one in block 158, in the Fourth ward of the city of Milwaukee, at a point one hundred and forty feet east from Reed street, thence running south 62° 10′ east one hundred and eighty-eight $\frac{90}{100}$ feet, thence south 17° 30′ west one hundred and six $\frac{8}{10}$ feet, thence north 63° 50′ west one hundred and fifty-two $\frac{78}{100}$ feet to the dock line, thence north on said dock line one hundred and twenty $\frac{86}{100}$ feet to the place of beginning.

May it please your honor to grant unto your orator the writ of subpœna issuing out of and under the seal of this court, to be directed to the said Peter Yates and Clark Shepardson, therein and thereby commanding them, and each of them, on a certain day and under a certain penalty therein to be specified, to be and appear before this honorable court, and then and there to stand to, abide by, and perform such order, direction, and decree in the premises as to your honor may seem meet and just.

WILSON GRAHAM, *City Att'y.*

UPHAM & GRAHAM,
Sol'rs for Complainant.
D. A. UPHAM, *of Counsel.*

STATE OF WISCONSIN, *Milwaukee County, ss:*

On this 4th day of October, A. D. 1856, before me personally appeared Wilson Graham, who, being duly sworn, deposeth and says he is
158 city attorney for the city of Milwaukee; that he has read the foregoing bill and knows the contents thereof; and that as to those matters and things therein stated on information and belief he believes it to be true, and as to the several other matters and things therein stated he knows it to be true in substance and in fact.

DAVID B. OGDEN,
Not. Pub., Resid. in Mil. C'ty.

Afterwards, to wit, on the same day, to wit, on the 8th day of October, 1856, came the said defendants, by their attorney, and file in the office of the clerk of the court aforesaid a certain affidavit in the words and figures following, to wit:

Mil. cir. court.

THE CITY OF MILWAUKEE
vs.
PETER YATES & CLARK SHEPARDSON. } In equity.

MILWAUKEE COUNTY, *ss:*

Peter Yates, one of the above-named defendants, being duly affirmed, deposes and says that himself & the said Clark Shepardson have been, at

the present term of the circuit court of said county, indicted for the same identical matters & things stated & charged in the bill in this cause; that said indictments are still pending & undetermined; & that himself & said Shepardson are both ready for trial upon said indictments upon 24 hours' notice of the time of trial, & are anxious for & will insist upon trials at the present term of this court; & deponent knows of no reason why they should not be tried within five days from this date.

Deponent further says that he & the said Shepardson are not guilty of the matters or nuisance laid to their charge in the said indictments, or the bill in this case, & that they have a perfect & full defence thereto upon the merits.

Deponent further says that their several docks are fully built & completed, except the putting in some lining to about 60 feet of the dock built & exclusively owned by defendant; which lining of pine boards, if
159 put in, can be easily removed by one man in fifteen minutes thereafter; that, except perhaps said lining, it is not contemplated or intended by deponent or said Shepardson to do anything more to said dock, or to disturb the said covered by the water at said point, until after the trial of said Yates upon said indictment, & he acquitted & discharged therefrom.

Deponent further says that the docks of himself & said Shepardson, which are owned in severalty exclusively, are not any encroachment upon the navigable waters of the said Milwaukee & Menomonee Rivers, nor any nuisance or obstruction whatever to the navigation of said rivers, or either of them; &, on the contrary, that said docks are severally built upon the several grounds of himself & said Shepardson; & that deponent has no interest or property in the ground or dock of said Shepardson, nor has the said Shepardson any interest or property, profit or advantage, in the ground and dock of this deponent; and that the said several docks, though upon the same line on the north, are severally built upon the exclusive private property of the said Shepardson & this deponent; & the said waters, where they are respectively built, are not & never have been subject to the public easment of navigation; & that therefore the said ordinance or city dock line set forth in this bill in this cause is unconstitutional & void, as attempting to take & appropriate private property to public use, without just compensation, as required by the constitution of this State.

PETER YATES.

Affirmed before me this 8th day of Oct., 1856.

MATTHEW KEENAN,
Clerk Cir. C't Mil. Co., Wis.

Afterwards, to wit, on the 16 day of October, A. D. 1856, comes the defendants, and enter their appearance in the words and figures following, to wit:

Circuit court of Milwaukee County.—In equity.

160 THE CITY OF MILWAUKEE
vs.
PETER YATES & CLARK SHEPARDSON.

And now comes the above-named defendants, by A. C. Fraser, their solicitor, and, waiving the issuing and service of subpœna upon them,

enter their appearance in this suit, & request the same to be entered accordingly.

A. C. FRASER,
Sol. for Def'ts.

Afterwards, and on the same day, to wit, October 16, 1856: And now at this day the court being well and sufficiently advised of, and concerning the application for, the injunction heretofore made in this cause, the same having been heretofore argued & submitted, it is considered and adjudged that said application be, and is hereby, overruled and denied.

Afterwards, to wit, on the 31 day of October, A. D. 1856, came the said defendant, by their solicitor, and filed in the office of the clerk of the court aforesaid their certain demurrer in the words and figures following, to wit:

The demurrer of Clark Shepardson and Peter Yates, defendants, to the bill of complaint of the City of Milwaukee, complainants.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demurrer thereto; and for cause of demurrer show that the said complainant hath not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against these defendants.

Wherefore these defendants demand the judgment of this honorable court, whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein
161 contained, and prays to be hence dismissed with their reasonable costs in this behalf sustained.

A. C. FRASER,
Sol. for Def'ts.

A. C. FRASER, *of Counsel.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

A. C. FRASER,
Def'ts' Counsel.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Alex. C. Fraser, of the city of Milwaukee, in said county, being duly sworn, deposes and says that he is the solicitor for the defendants mentioned in the foregoing demurrer, and that the same is not interposed for delay.

A. C. FRASER.

Sworn to before me this 31st day of October, 1856.
MATTHEW KEENAN.
Clerk Cir. C't Mil. Co., Wis.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, James Hickcox, clerk of said court, do hereby certify that I have compared the foregoing copy with the original, the record and proceed-

ings entered in the action therein entitled; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 4th day of November, A. D. 1868.

[SEAL.] JAMES HICKCOX, *Clerk.*

STATE OF WISCONSIN, *Milwaukee County, ss:*

I, Arthur Mac Arthur, judge of the circuit court of the State of Wisconsin for the second judicial circuit, and presiding judge of the said court for the county of Milwaukee, do hereby certify that the foregoing attestation of James Hickcox, as clerk of the circuit court within
162 and for the county of Milwaukee and State of Wisconsin, is in due form of law and by the proper officer; that I am acquainted with his handwriting, and that his signature is genuine, and that the seal thereto attached is the proper seal of said court.

In witness whereof, I have hereto set my hand this 6th day of November, A. D. 1868.

$10. ARTHUR MAC ARTHUR,
Circuit Judge 2 Judicial Circuit, Wis.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, James Hickcox, clerk of said court, do hereby certify that I am well acquainted with the handwriting of the Hon. Arthur Mac Arthur, whose name is affixed to the foregoing certificate; that the said signature is in his own handwriting; that he was at the time of signing the same the judge of the circuit court of the State of Wisconsin for the second judicial circuit, and presiding judge of the said court for the county of Milwaukee duly commissioned and qualified.

In testimony whereof, I have hereto set my hand and affixed the seal of said court at Milwaukee, this 6th day of November, A. D. 1868.

[SEAL.] JAMES HICKCOX,
Clerk Cir'it C't Mil. Co., Wis.

End of testimony.

And afterwards, to wit, on the seventeenth day of the said term, (September term, 1868,) to wit, on the fifth day of October, A. D. 1868, the following proceedings were had, to wit:

163 *Decree.*

RYNIER V. YATES
vs.
THE CITY OF MILWAUKEE & ALEXANDER MILLER. } In equity.

This day came the parties, by their counsel, and on consideration of the pleadings and proofs, and of the arguments of counsel, it is ordered, adjudged, and decreed by the court, that the complainant's bill of complaint be, and hereby is, dismissed, and that the complainant pay the costs of this suit and proceeding, to be taxed within ten days, or in default thereof an execution be issued against him for the same.

A. G. MILLER.

OCTOBER 7, 1868.—This day came the complainant, by his counsel, and prayed an appeal to the Supreme Court of the United States as follows:

Appeal.

In circuit court of the United States for the district of Wisconsin.

RYNIER V. YATES, COMPLAINANT,
vs.
THE CITY OF MILWAUKEE AND ALEXANDER MILLER, defendants. } In equity.

And now comes the complainant, by Peter Yates, his solicitor, the matter in dispute, exclusive of costs, exceeding the sum or value of two thousand dollars, and prays an appeal to the Supreme Court of the United States from the final decree of this court dismissing the complainant's bill with costs.

Dated Oct. 7, 1868.

PETER YATES,
Solicitor for Complainant.

164 *Allowance of appeal.*

Whereupon it is ordered by the district judge that an appeal be and hereby is allowed, and that the complainant give bond with sureties, to be approved by the judge, in the penalty of two hundred and fifty dollars conditioned for the payment of the costs, no supersedeas being prayed for.

DECEMBER 23, 1868.—This day came the complainant, by his solicitor, and filed the bond of Benjamin Bagnall and Nathan Pereles, in the penalty of two hundred and fifty dollars, conditioned to prosecute his appeal to effect, and answer all damages and costs if he fail to make good his plea, which is approved by the district judge as a bond for costs, and is as follows:

Appeal bond.

Circuit court of the United States, district of Wisconsin.

RYNIER V. YATES, APPELLANT,
vs.
THE CITY OF MILWAUKEE AND ALEXANDER MILLER, respondents. } In equity.

Know all men by these presents that we, Benjamin Bagnall and Nathan Pereles, of the city of Milwaukee, Wisconsin, are held and firmly bound unto the City of Milwaukee and Alexander Miller, in the sum of two hundred and fifty dollars, to be paid to the said City of Milwaukee and Alexander Miller, its successors & his assigns; to which payment, well and truly to be made, we bind ourselves and each of ourselves, and each of our heirs, executors, and administrators, jointly & severally, firmly by these presents. Sealed with our seals and dated the twenty-fourth day of November, one thousand eight hundred and sixty-eight.

Whereas the above-named Rynier V. Yates is about to prosecute an appeal from the decree heretofore entered in this action in and by the circuit court of the United States for the district of Wisconsin

165 to the Supreme Court of the United States to reverse said decree:

Now, therefore, the condition of the above obligation is such, that if the above-named Rynier V. Yates shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea in that behalf, then this obligation shall be void; otherwise the same shall be & remain in full force and virtue.

BENJAMIN BAGNALL. [SEAL.]
NATH. PERELES. [SEAL.]

Sealed & delivered in presence of—
E. MARINER.

(Endorsed:) Dec. 23, 1868. Approved as a bond for costs, &c.
A. G. MILLER, *District Judge.*

Whereupon a citation issued.

166 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Rynier V. Yates vs. the City of Milwaukee & Alexander Miller.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district of Wisconsin, this eighteenth day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the said United States the ninety-third.

[SEAL.] EDWARD KURTZ, *Clerk.*

167 [SEAL] The United States of America to the City of Milwaukee and Alexander Miller, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to an appeal in the circuit court of the United States of America for the district of Wisconsin, wherein Rynier V. Yates is appellant, and you are appellees, to show cause, if any there be, why the decree passed against the said Requier V. Yates should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-third day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-third.

A. G. MILLER, *District Judge.*

I accept service of above citation this 6th day of February, 1869.
D. G. HOOKER, *Def'ts' Att'y.*

168 (Indorsement on record:) No. 235. Rynier V. Yates, appellant, vs. the City of Milwaukee and Alexander Miller. Wisconsin C. C. U. S.
Filed 26 May, 1869.

Supreme Court of the United States.

DECEMBER TERM, 1870.

R. V. YATES, Complainant and Appellant,

vs.

THE CITY OF MILWAUKEE and ALEXANDER MILLER.

BRIEF FOR APPELLANT.

MATT. H. CARPENTER,

Of Counsel.

McGill & Witherow, Printers and Stereotypers, 1107 E street, Washington, D. C.

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Supreme Court of the United States.

DECEMBER TERM, 1870.

RYNIER V. YATES, appellant,
vs.
THE CITY OF MILWAUKEE AND ALEXANDER MILLER.
No. ——.

This is an appeal from the circuit court of the United States for the district of Wisconsin, in equity, dismissing the complainant's bill.

I.

There is a question of practice arising upon this record, that should be considered before examining the merits of the case.

The bill was filed to obtain an injunction against the city of Milwaukee and its contractor, Alexander Miller, to restrain the removal of a wharf built from block 158, in Milwaukee, adjacent to the Milwaukee river, which the complainant claimed as his private property, but which the city contended was an obstruction to the navigation of the river, and, therefore, a nuisance.

The defendants filed a demurrer as to part, and an answer as to the residue, of the bill, upon which the complainant's motion for a preliminary injunction was heard and denied September 28, 1866. The court overruled the demurrer and made an order "that the defendants *have leave* to withdraw their present answer from the files, and that they file a new answer by the first Monday of November next." (*R.*, *p.* 22.)

The defendants not having availed themselves of this leave by filing further answer, the complainant, on the first Mon-

day of December, entered a rule, setting down the case for hearing on the first Monday of January, 1867.

This rule was regularly entered.

The bill was filed December 19, 1864.

Subpœna served December 20, 1864.

Defendant filed demurrer to part, and answered a part, May 16, 1865.

Replication was filed to this answer May 30, 1865.

The demurrer being overruled September 20, 1866, and order for leave to withdraw answer and file new one being entered September 20, 1866, the defendants were bound to answer that part of the bill which was covered by the demurrer within the time fixed by the court; but unless the defendants availed themselves of this permission, the answer would, of course, stand as the answer to that part of the bill it pretended to cover. The defendants not having availed themselves of the permission granted, the complainant was regular in setting down the case for hearing; and the defendants had no right, after the expiration of the time fixed by the court, and after the cause had been set down for hearing, to file a new answer without obtaining further leave of the court for that purpose.

February 4, 1864, the plaintiff moved the court to strike off the new answer, which the defendants had filed without leave of the court, for irregularity. (*R.*, p. 28.)

This motion was denied by the Court. (*R., p.* 30.)

The motion should to have been granted, for various reasons.

(1.) Because the new answer was filed without leave; and an answer thus filed should be stricken out.

Thomas v. *Visitors, &c.*, 7 *Gill & Jay*, 369.

(2.) The new answer is not the answer of Alexander Miller, because it is neither signed, nor sworn to, by him.

1 *Daniels' Ch. Pr.*, 745, and notes.

Dennison v. *Bassford*, 7 *Page*, 370.

And it is not the answer of the city of Milwaukee, because

it is not made under the seal of the corporation. The charter, acts of 1852, provides for a seal.

1 *Daniels' Ch. Pr.*, 136, and notes.
1 *Smith's Ch. Pr.*, 189.

"A corporation must appear and answer the bill, not under oath, but *under its common seal.*"

Bronson v. *Railroad Company*, 2 *Wallace*, 302.

(3.) It is not the answer of the city for another reason: it is not signed by the principal officer of the city—the mayor.

1 *Daniels' Ch. Pr.*, 744, 745, and notes.

(4.) And this answer should have been stricken off, because it purports to be the joint and several answer of the city and of Miller; but is not signed by the principal officer of the city, nor signed at all by Miller.

Fulton Bank v. *Beach*, 6 *Wen.*, 36.

The motion to strike off this irregular answer should have been granted; and that part of the bill covered by the demurrer, which the court had overruled, *should have been taken as confessed.*

II.

THE MERITS OF THE CASE.

In 1856 Peter Yates was the owner of a piece of land, east of block No. 158, adjacent to the Milwaukee and Menomonee rivers, at their confluence, covered by the shallow and unnavigable waters of the river; and in the fall of that year, at an expense of more than five thousand dollars, he erected a wharf thereon, and excavated the earth between the wharf and the navigable waters of the Milwaukee river, so that vessels could approach the wharf. This wharf is now owned by the complainant, as the grantee of the said Peter Yates. The city of Milwaukee, by its common council, having declared this wharf to be an obstruction of the navi-

gation of the river, made a contract with the other defendant, Miller, for its removal; and Miller being about to remove the wharf, the complainant exhibited his bill for an injunction.

The real matter in difference, therefore, between the parties is this: the complainant contends that this wharf is a legal erection, and is his private property. The defendant contends (1) that the wharf is an obstruction to the navigation of the river, and therefore a common nuisance; and (2) that the city has a right to remove the same, as it proposes to do.

The law is well settled, in the State of Wisconsin, by a series of well-considered decisions in the supreme court of the State, to be, that the owner of land bordering upon a fresh-water stream, above the ebb and flow of the tide, owns to the center of the stream, subject to the right of the public to use the same as a highway *where it is navigable in fact.*

When the construction of this wharf was commenced by Shepherdson, prior to his conveyance to Peter Yates, a suit was brought by Walker, another riparian owner, to restrain the building of the wharf beyond the wharf line established by the common council. This case, *Walker vs. Shepherdson*, (4 *Wis.*, 486,) affirmed the doctrine of riparian rights, and the court held that Shepherdson, as the owner of lot 1, in block 158, had a right *to build the wharf out to navigable waters.* The court say:

"They (lot owners) may therefore construct docks or land-'ing places for goods or passengers, taking care that vessels 'employed in navigating the stream are not impeded in their 'passage, nor prevented from the use of *all parts of the stream* '*which are navigable.*

The court then proceeded, page 511, to dispose of the dock line established by the common council; and held that the legislature could not grant to the city power to fix such line without providing for compensation to the lot owners. The same court, in *Jones vs. Pettibone*, (2 *Wis.*,

308,) had previously held the same principle as to riparian ownership, citing

Middleton vs. Pricherd, 3 *Scam.*, 510.
Canal Tr. vs. Haven, 5 *Gill.*, 548.

III.

The great question on the merits, therefore, is, *whether or not this wharf does obstruct the navigation of the river.* And we contend that the defendants in this case are estopped upon that question.

At the September term, 1856, of the circuit court of Milwaukee county, Peter Yates, who was then the owner of this wharf, was indicted for its erection, upon the theory that it was an obstruction to navigation.

At the October term of the same court, 1856, the city exhibited a bill, on the equity side of the court, against Peter Yates and Clark Shepherdson, to prevent them from further continuing said alleged obstruction, and moved for a preliminary injunction; which was denied by the court. (*R.*, *p.* 87.) The defendants filed a general demurrer to the bill October 31, 1856, and no further proceedings have been had in that case.

Subsequently, Yates was tried upon the indictment and acquitted February 26, 1857. (*R.*, *p.* 75.)

At the April term of same court, 1857, Yates was again indicted for the same alleged nuisance, and pleaded his former acquittal; the State demurred; the court overruled the demurrer; and Yates was again discharged, October 24, 1857. (*R.*, *p.* 78.)

At the July term of the municipal court for Milwaukee county, 1863, Yates was again indicted for the continuance of the wharf, *and because the same was an obstruction to the*

navigation of said river, and a common and public nuisance; which indictment was removed to the circuit court for Milwaukee county for trial, where Yates pleaded his former acquittals; the State demurred; and the court overruled the demurrer. After which the State replied, and the issue was tried and found against the State, and the said Yates was a third time acquitted. (*R.*, 81.)

The last indictment was found upon the complaint of the comptroller of the city, and was prosecuted in court by special counsel retained by the city; so that, in reality, it was a prosecution by the city in the name of the State.

Deposition of Butler, R., p. 46.
Deposition of Kuehn, R., p. 46.

The attempt of the city to demolish this wharf is sought to be justified under an act of the legislature, which authorizes the common council of the city "*by ordinance* to establish 'dock and wharf lines upon the banks of the Milwaukee and 'Menomonee rivers, restrain and prevent encroachments 'upon said rivers and obstructions thereto; * * and also 'to cause the said Milwaukee river to be dredged," &c., (*R.*, 47;) and an ordinance of the common council, passed June 8, 1855, establishing a dock line. (*R.*, 47.) In other words, the sole power of the city to proceed in this matter is a power derived from the State—a power which it exercises for and on behalf of the State. It is not claimed that the city of Milwaukee is engaged in commerce, or the owner of any vessels which have been, or may be, hindered or delayed by this wharf. It is only in its character of guardian of the public rights that the city claims authority to demolish this wharf. Or, in still other words, the city is now attempting to do, on behalf of the State, what the State has three times attempted to do in its own name; that is, to remove this wharf, upon the ground that it is an obstruction to the navigation of the Milwaukee river.

The appropriate and usual way to try the question of nuisance, or no nuisance, for an alleged encroachment upon a highway, or obstruction of a navigable river, in the State of

Wisconsin, is by indictment. A verdict against the defendant is conclusive, and a part of the judgment is, that the nuisance be abated and removed. A verdict for the defendant is equally conclusive, and estops the State, and all who claim to proceed against the alleged nuisance under authority derived from the State. As matter of law, the right to maintain this wharf was and is clear, unless it obstructs navigation. The three successive acquittals of the owner, upon indictments found to try that question, are conclusive as against the State, and all claiming to act under authority derived from the State.

These three indictments were proceedings between the State of Wisconsin and Peter Yates. The city of Milwaukee is now claiming to act on behalf of the State, under authority derived from the State, and Miller, the other defendant, is the contractor, agent, servant of the city; and the complainant is the grantee of Peter Yates, so that the parties to this suit are respectively in privity with the parties in the criminal proceedings.

Judgments are binding not only upon parties but upon privies—privies in interest, law, or estate.

Greely v. *Smith*, 1 *Wood. & Minot*, 181.
Burnham v. *Webster*, *same*, 172.
Castle v. *Noyes*, 4 *Kernan*, 329.
Peterson v. *Lathrop*, 34 *Penn. St.*, 223.
Eaton v. *Water Works Co.*, 6 *Eng. L. & E.*, 340.
Benton v. *Wilkinson*, 18 *Vt.*
Lessees of Parish v. *Ferris*, 2 *Black.*, 606.
Sturdy v. *Jackaway*, 4 *Wallace*, 174.

IV.

This property, after the acquittal of Peter Yates on the second indictment, was regarded by the city, and everybody else, as private property; and in all the years, from 1859 to 1863, inclusive, it was regularly taxed. Once it was sold, and the tax deed is in evidence. (*R.*, *p.* 40.)

The fact of taxation and sale is an estoppel on the city of

Milwaukee and on the State of Wisconsin. While both State and city are retaining the purchase money for which they sold the property, it is hard, indeed, if they can prevent their grantee from occupying the premises.

Section 3, of an act to amend the charter of the city, approved March 29, 1855, in force when this sale was made and the deed given, provides, that "every deed made and executed 'substantially in the above, or any equivalent form, shall be '*prima facie* evidence that all the proceedings necessary to the 'validity and effectual operation of such deed have been had 'according to law; and shall also be *prima facie* evidence *that* '*the title to the land* which such deed purports to convey, *is vest*-'*ed in the grantee therein named*, his heirs, or *assigns*, from the 'date of such deed; *and no other proof of the title* shall be re-'quired of any person claiming title under such deed *than the* '*production of such deed*, and (if he be not the grantee therein 'named) of the proper evidence that he claims through such 'grantee."

The doctrine of estoppel applies to a State as well as to private persons. Where a State grants lands, having parted with all its interests in such lands, it is estopped from subsequently claiming any right thereto.

Vermont v. *Society, &c.*, 2 *Paine C. C.*, 545.

Taxation is a proceeding *in rem* against the property itself. The whole estate in the land is charged, and such proceedings interrupt all titles and bind all persons concerned.

Salter v. *Reed*, 15 *Penn. St.*, 260.
Chestnut v. *Marsh*, 12 *Ill.*, 173.
Gwyn v. *Niswanger*, 29 *Ohio*, 558.

V.

But apart from all benefit arising from estoppel under the above-mentioned acquittal and the tax deed, and admitting the question to be still open, *this wharf does not obstruct the navigation of the river, and therefore is not a nuisance.* The wharf is not within one hundred and fifty feet of the navi-

gable waters of the river in a natural state, and navigation to the wharf was only rendered possible by the excavation made by Peter Yates on his own land for that purpose.

See Deposition of Wm. S. Trobridge, R., 33, 34.
Deposition of Peter Yates, R., 35 *to* 37.
Deposition of Jacob Nunnemacker, R., 38.
Deposition of Benj. Bagnall, R., 38.
Deposition of James Porter, 38, 39.
Deposition of Wilson Graham, R., 39.

The doctrine laid down by the supreme court of Wisconsin, in *Walker* v. *Shepherdson*, (4 *Wis.*, 486,) on the faith of which this wharf was completed, was that the lot owners on this river "may construct docks or landing places for goods 'or passengers, taking care that vessels employed in navigat-'ing the stream are not impeded in their passage nor prevented 'from the use of *all parts of the stream which are navigable.*" And this is the settled rule in the State courts of Wisconsin. This court, in *Railroad Company* v. *Schurmeir*, (7 *Wallace*, 289,) in a case which involved the construction of a grant of land by Congress as against the title of parties claiming under a patent, held that under the laws of Congress the title of purchasers of land bordering upon navigable rivers was limited by the stream, while the title to lands bordering on a non-navigable stream extended to the centre of the stream.

This conflict of cases is immaterial in this case, because if the owner of land bordering on a navigable stream is considered as holding to the center of the stream, yet his title is subordinate to the right of navigation in the public; and this court held, in *Railroad Company* v. *Schurmeir*, that the owner on a navigable stream had the same rights as to building piers and wharves that belong to riparian owners on tide-waters. So that in this case it is immaterial which principle is applied. The language of this court, above referred to, is:

"Although such riparian proprietors are limited to the 'stream, still *they also have the same right to construct suitable 'landings and wharves*, for the convenience of commerce and 'navigation, as is accorded riparian proprietors bordering

on 'navigable waters affected by the ebb and flow of the tide."

In *Dutton* v. *Story* (1 *Black.*, 23) this court held, that a bridge pier attached to the land and running several hundred feet into the lake, "so that vessels could approach it for the pur-'pose of taking in freight, serving both as a wharf to the nav-'igable waters of the lake and as a place of deposit for mer-'chandise designed for transportation by water," was a legal 'erection.

The court say, p. 31,

"Unless it be true that every landing place and bridge 'pier erected on the shore of navigable waters, without a 'special authority from the legislature, is necessarily a nui-'sance, it is a sufficient answer to the first position of the 'plaintiffs to say, *that there was not a* particle of evidence in 'the case to support the theory of fact on which the propo-'sition is based. All that appeared upon the subject in the 'court below was, *that the bridge pier in question extended several 'hundred feet into the waters of the lake;* but it was not even 'suggested that *any less extension would have answered the pur-'pose* for which the pier was constructed, or that it was any 'greater than is usual in similar erections on that shore of 'the lake, *or that the pier, as constructed, constituted any obstruc-'tion whatever to the public right of navigation.*"

Angel on Tide Waters, p. 196:

"From the period of the first settlement of this country 'to the present, the necessity of wharves, quays, piers, &c., 'has existed, for the loading and unloading of boats and ves-'sels; and for such purposes the appropriation of the soil 'below the ordinary high-water mark, by extraneous addi-'tions to the upland, has been found indispensable. It is 'well known that, in the respective States which lie along 'the margin of the Atlantic, there are many places where 'the tide ebbs and flows (and which therefore, according to 'the strict rule of the common law, are public) that are of 'no navigable use; and in their original condition, without

'the aid of art and industry, afford to the public not the 'slightest advantage of any kind. Flats, marshes, and other 'grounds, which are covered with water only at full tide, 'are places of this description. The detriment which the 'community receives from the recovery, private appropri- 'ation, and occupation of such soil is obviously little, if any. 'So far from it, the result has proved that the public are 'thereby, in a very considerable degree, the gainers, as they 'are thus accommodated with landing places, which are es- 'sential to every commercial depot, and are also accommo- 'dated with new thoroughfares, streets, avenues," &c.

In *Bainbridge* v. *Sherlock*, (29 *Ind.*, 264,) the court, after deciding that riparian owners may build wharves, say:

"These wharves, if they would subserve the only purpose 'for which they exist, must approach at least to the edge of 'that portion of the river *that is practically navigable.* The 'right to place and maintain them *even beyond this point*, pro- 'vided they do not unnecessarily obstruct navigation, is a 'well-established incident to riparian bills. The wharf boat 'is entitled to the same immunity from trespass or obstruc- 'tion by vessels navigating the river as the land itself."

In *Rice* v. *Ruddiman*, (10 *Mich.*, 125,) it was held, that "the 'ownership of land bordering upon the lake carries with it 'the ownership of land under the shallow water so far out 'as it is susceptible of beneficial private use, but subordi- 'nate to the paramount public right of navigation, and the 'other public rights incident thereto."

Christiancy, J., in that case, says:

"Whether the riparian ownership extends to the center 'of the lake, is a question not involved in this case; the 'only question being whether it extends to the place where 'the mill is erected, which is in the shallow water of the lake, 'some *twenty-nine or thirty rods* from the shore, on ground 'which is susceptible of beneficial private use and enjoyment 'as land. * * But if the water continues so shallow as to

'render the lands under it susceptible of beneficial private 'use to the center line of this narrow lake, then I have no 'hesitation in saying I think the riparian ownership extends 'to such center line," &c.

The same principle had been declared in regard to the Detroit river, in *Lorman* v. *Benson*, (8 *Mich.*, 18.)

According to the doctrine of these cases this wharf might have been extended one hundred and fifty feet farther than it was, because it would then only have reached navigable waters.

Angel on Highways, § 58:

"A riparian proprietor does not, in England, make his 'water-course a public one, or one subject to public use, by 'making it at his own expense boatable by artificial means, 'as by locks or by uniting other waters, unless the improve-'ment be made by public authority, or for a long continu-'ance of time it has been used by the public. In this coun-'try, likewise, such little streams as are not boatable, that is, 'as cannot, *in their natural state*, be used for the carriage of 'boats, rafts, or other property, are wholly and absolutely 'private; not subject to the public interest, nor to be re-'garded as public highways by water.

Coates v. *Wadlington*, 1 *McCord*, 580.

"If a person be the owner on both sides of such stream, and 'at his own expense makes it boatable by artificial means, it 'does not thereby become public; it is still private property, 'and cannot be infringed, even by the legislature, without 'satisfaction being made."

Wadsworth v. *Smith*, 2 *Fairf.*, 278.

The legislature cannot deprive the riparian owner of *any of his rights* without making compensation.

Walker v. *Board Public Works*, 16 *Ohio*, 540.
Moore v. *Veazie*, 2 *Red.*, 343.
Bell v. *Gough*, 3 *Zabr.*, 624.
Binney's Case, 2 *Bland*, 158.
Walker v. *Shepherdson*, 4 *Wis.*, 486.

VI.

But conceding that there is no estoppel; and conceding that as matter of fact this wharf is an obstruction of navigation; still this decree should be reversed, and the injunction prayed for by the bill should be granted.

By the common law a nuisance can only be abated by one who suffers some *special* injury, not common to other persons.

Broome, Com., lays down the rule as follows, at page 250:

"In regard to the abating of a *public* nuisance, *it is laid* 'down that 'if a new gate be erected across the public high-'way, which is a common nuisance, any of the king's sub-'jects passing that way may cut it down and destroy it. 'The cases below referred to, (*Dimes* vs. *Petty*, 69 *Eng.* '*Com. Law Rep.*, 276; *Bridge* vs. *Grand Junction* R. C., 3 '*M. and W.*, 244; *Davies* vs. *Mann*, 10 *M. & W.*, 546; *Bate-'man* vs. *Black*, 21 *L. J. Q. B.*, 406,) however, show that to 'justify a private individual in abating *on his own authority* 'such a nuisance, *it must appear* it does him a *special injury;* 'and he can only interfere with it as far as may be *necessary*, 'to exercise his *right of passing* along the highway with 'reasonable convenience, AND NOT BECAUSE THE OBSTRUCTION 'HAPPENS TO BE THERE."

To the same purport is the author of a very learned and discriminating treatise: PHEAR ON RIGHTS OF WATER, 107, republished in 27 Law Library, sixth series, 70.

"However, *the person aggrieved* is not forced to seek his 'relief by the aid of legal process, but is justified, after giv-'ing notice in those cases which require it, in going himself 'upon his neighbor's land, and with his own hand putting 'an end to it, or, as is technically termed, abating the nui-'sance, *taking care that in* effecting this he does as little in-'jury as may be." * * *

"Of course, no action will lie either in trespass or nui-'sance, unless a *right* be infringed; but if the infringement

'be proved, nominal damages must be awarded, whether 'actual damage were a consequence or not. In cases where 'the *right* alleged to be infringed is merely the right to be 'protected from *actual* damage, manifestly no action can 'succeed, unless actual damage be proved."

"The *rights* hitherto spoken of are those which *are per-* '*sonal to the individual.* When rights are in question which 'belong to the person *aggrieved only as being one of the public,* 'the remedy must be applied for, *in the name* of the public. 'The *only* mode of proceeding *for this purpose* is by indict- 'ment. If, however, the inconvenience to the individual is 'of such a character as to work *personal loss,* it then becomes 'a private injury," &c., citing, among others, *Mayor of Colchester* vs. *Brooke,* (7 Q. B., 339.)

This whole doctrine has also been most ably expounded by the judges of the supreme court in the State of New York, in the case of *Harrower* vs. *Ritson,* (37 Barb. Rep., 301.) In that case, Justice Allen (Justices Bacon and Mullin concurring) reviews all former decisions upon the subject, and at page 309 says: "If the unqualified right exists, and any 'person may of his volition and without process of law abate 'a public nuisance upon the peril only of showing in justifi- 'cation that the property destroyed or removed is a nuisance 'and indictable as such, there can be no distinction made as 'to the kind or character of the nuisance. It may be a par- 'ticular trade, which is only obnoxious because carried on in 'a particular place, or in a particular manner; it may be 'something which affects the health, or the air, or renders 'the enjoyment of property uncomfortable, or depreciates 'the value of property; or it may be something which tends 'to a breach of the public peace: a disorderly house, a gam- 'ing house, or a hospital, as well as the obstruction of a 'navigable river, or a public highway, or the inclosure of a 'common. To suffer any one, *without necessity,* to become 'the executor of this branch of the common law, without 'the intervention of the ordinary forms of law and a resort

'to the process of the courts, would tend to gross injustice, 'breaches of the peace, and riots, *and the remedy would be* '*worse than the evil to be redressed.*"

Again, he says: "A party, by erecting a nuisance, does 'not put himself *or his property* beyond the protection of the 'law. If an individual or member of the community can 'with reasonable care, notwithstanding the act complained 'of, enjoy the right or franchise belonging to him, he is not 'at liberty to destroy or interfere with the property of the wrong-doer."

See also *Bridge Co.* vs. *Smith*, 30 *N. Y.*, 44.
Rogers vs. *Baker*, 31 *Barb.*, 447.
Clark vs. *Syracuse*, 13 *Barb.*, 32.

In *Dimes* vs. *Petley*, (15 *A. & Ellis, N. S.*, 276:) That was an action for damage to plaintiff's wharf by the defendants' vessel. The plea was "that the wharf had been made and contin- 'ued by the plaintiff, *and projected into the navigable river below* '*low-water mark*, and unlawfully obstructed the navigation of 'part of the river, and the liege subjects could not use *that* '*part* unless the wharf were broken, as in the declaration 'mentioned; that the defendant had occasion to pass with 'the vessel over *that part* of the river, and in so passing did 'the damage, and that he managed his vessel with all skill 'necessary to navigate the river had that part not been so 'obstructed." Replication: *de injuria.* The court held the plea bad, because it "contained no averment that it was ne- 'cessary to pass over this part of the river, or even *that de-* '*fendant could not conveniently navigate the river without coming in* '*contact with the nuisance.*"

In this case Lord Campbell, C. J., says:

"Now, it is fully established by the recent cases of *Bridge* vs. *Railroad*, (3 *Mees. & W.*, 244;) *Davis* vs. *Mann*, (10 *Mees. & W.*, 546,) and *Mayor of Colchester* vs. *Brooke*, (7 *Q. B.*, 339,) 'That if there be a nuisance in a public highway, a private 'individual cannot of his own authority abate it unless it does 'him a special injury, *and he can only interfere with it so far*

'*as is necessary to exercise his right of passing along the highway;* 'and, without considering whether he must show that the 'abatement of the nuisance was *absolutely necessary* to enable 'him to pass, we clearly think that he cannot justify doing 'any damage to the property of the person who has improp- 'erly placed the nuisance in the highway, if, avoiding it, he 'might have passed on with reasonable convenience." And the plaintiff had judgment for the damages done to his wharf.

In *Mayor of Colchester* vs. *Brooke*, (7 *A. & E., new series*, 376,) the declaration charged the defendant with so unskillfully navigating the river as to injure the plaintiff's oyster beds.

The court say:

"The sixth plea merely alleges that the oysters and oyster 'brood were so placed, and in such masses, as unlawfully 'to diminish the depth of water, and greatly obstruct the 'navigation, to the common nuisance of the queen's subjects; '*but it does not go on to allege that the vessel could not with due* '*care and skill have passed up the river or grounded without* '*doing the injury complained of.* Looking at the count and 'this plea by themselves, it may well be that there was abun- 'dance of room and of water for the vessel to have passed up 'without going near the alleged nuisance; and if that were 'so, however wrongful the act of the plaintiffs, yet, as the 'defendant sustained no special inconvenience thereby, he 'certainly could not have been justified in willfully infringing 'upon or destroying the oysters, even for the purpose of 'abolishing the nuisance."

This doctrine is fully settled by this court.

Georgetown vs. *Alexandria Canal Co.*, 12 *Pet.*, 91.
Railroad vs. *Ward*, 2 *Black*, 485.

2. The legislature of Wisconsin has not attempted to clothe the city with such power as it assumes to exercise in this case; and had the legislature attempted it, it is forbidden by the constitution of the State.

The act relied upon (Record, 47) provides, section 2:

(1) "The common council shall have power, *by ordinance*, 'to establish dock and wharf lines upon the banks of the 'Milwaukee and Menomonee rivers, *restrain* and *prevent* en-'croachments upon said rivers and obstructions thereto;

(2) "And to construct, alter, maintain, or cause to be con-'structed, altered, and maintained, at the expense of the city, 'wharves, &c.; and

(3) "And also to cause the Milwaukee river to be 'dredged," &c.

Three things the common council are by this section authorized to do—the first clause is the only material one. That is, they may "*by ordinance*" establish dock lines and restrain encroachments, &c. The charter also provides that the violation of an ordinance of the city shall be punished by fine, *to be collected by the city by an action at law.* The city can pass an ordinance, and, if it be not obeyed, can bring an action to collect the penalty, when the validity of the ordinance can be tested in the courts. But they cannot by ordinance employ a contractor to demolish a dwelling-house supposed to encroach upon the highway; nor, under this act, can they order the destruction of the plaintiff's property. The legislature itself does not possess, nor can it delegate, such a power. The legislature may pass a law to provide for the punishment of any man who shall obstruct a highway; but it cannot pass a law declaring that the house of A does obstruct a highway, for that would be an exercise of judicial power.

"Where a corporation relies upon a grant of power from 'the legislature for authority to do an act, it is as much re-'stricted to the *mode* prescribed by the statute or charter for 'its exercise, as to the thing allowed to be done."

Angel & A. Corp., sec. 111.

Loan and Trust Co. vs. *Carroll*, 5 *Barb.*, 613.

Beatty vs. *Knowles*, 4 *Pet.*, 152.

It would be monstrous to say, that after the State had

failed in three successive attempts, in its highest court of original jurisdiction, to have this wharf declared a nuisance and removed, it could authorize the common council of Milwaukee to declare it a nuisance and remove it, without allegation, proof, or trial.

VII.

But it is understood that the respondents will rely upon *Judd* vs. *Yates*, (17 *Wis.*, 118) to overthrow all the doctrine which has been considered as settled in regard to riparian ownership, both in England and in this country, for several centuries. This makes it important to attend to the exact character of that decision, to ascertain whether it be one which this court will follow, and thus overrule its own decisions, as well as all former decisions upon the same subject by the supreme court of Wisconsin, and of all other courts, English and American. The pleadings and bill of exceptions in that case were given in evidence in this case, subject to our objections, and may be found, Record 56 to 67.

Peter Yates, the complainant's grantor, sued Truman H. Judd, a stranger to this suit, alleging that he, said Yates, was the owner of a certain wharf, (being the wharf in question in this suit,) and that Point street, which was originally laid out to the low and unnavigable waters of the river, had been filled in, on the north half thereof, adjacent to the wharf of the plaintiff. That the defendant had wrongfully entered upon that portion of Point street which had been filled in and graded, and had excavated the same; and that, in consequence thereof, the wharf of the plaintiff had been partially undermined, &c., and claimed damages for this consequential injury.

The answer contained several defenses, but the only one upon which there was any pretense of evidence at the trial, and the one on which the supreme court reversed the judgment in favor of the plaintiff, was, that the former owners of lot 6, section 29, including the premises, had made a plat;

that, in subsequent partition suit between the owners, the court had adopted the plat, and divided the lots among the owners with reference to the plat; that the plat represented the premises as a portion of Milwaukee river, and that "*the premises became thereby a highway by water.*"

The answer alleged, but no proof was given under it at the trial, that defendant was in occupation of a lot on the opposite side of Point street, and that the wharf of plaintiff made access to defendant's premises more difficult. *But the answer did not allege that the defendant could not, with reasonable care, go to and from his premises without interfering with this wharf.* No proof whatever was offered by the defendant upon this subject, as the bill of exceptions shows. (R., 60.)

On the trial, the plaintiff proved that the defendant took the earth from the north half of Point street, and from the plaintiff's wharf, and deposited it upon the defendant's lot to fill it up, and that the plaintiff's wharf was thereby injured.

Yates did not question the defendant's right to fill up his own lot, or to throw out from it a pier or wharf to navigable water in the river; but he did deny his right to take earth from his wharf for that purpose; and his claim for damages was within the very words of the Supreme Court in *Walker* vs. *Shepherdson*, (4 *Wis.*, 486.) The court, there speaking of the parties who were owners of adjacent lots, say:

"It is apparent that both the complainant and the defend-
'ant have equal rights; that is, equal in proportion to the
'quantity of land which they severally own along the margin
'or branch of the river, *and that neither of them can so use*
'*his land as to impair the right of the other.* If the complainant
'chooses to excavate a basin on his own land, within which
'vessels can lie, and discharge and receive their cargoes, we
'think he has an undoubted right to do so, provided the nav-
'igation of the river is not thereby impaired; *but he cannot,*
'*by adopting this mode of improvement, impair the right of other*
'*separate owners to the use of their proporty, or impose addi-*

'*tional duties or burthens upon them.*" That is, one lot owner cannot tear down his neighbor's wharf, and use the material to fill up his own. And, upon the authority of this case, the plaintiff recovered in the court below, and the case was taken to the supreme court, where it was decided, that "the 'premises for the injury to which the plaintiff complains 'were devoted by the original proprietors to the public use 'as a highway by water; and, *consequently*, that the grading, 'filling, and other works of the plaintiff within the line of 'such highway, by which it is blocked up and destroyed, 'were a public nuisance;" and the court reversed the judgment and remanded the case for a new trial; (17 *Wis.*, 118.) But the record does not show any subsequent proceedings.

Now, in regard to this decision, it is submitted:

1. That, although the record was given in evidence subject to our objection, and is set out in this record, the decision in that case is not *an estoppel* upon us.

Had a decision of the matter in issue in this cause been made by a court of competent jurisdiction, in a cause between these parties, that would have passed the question in *rem adjudicatam;* and, no matter how incorrect the decision, it would be binding. But to have this effect, two elements must exist: the subject-matter and the parties must be identical. Therefore, the record in *Yates* vs. *Judd* cannot be given in evidence as the foundation of an estoppel in this case by the city of Milwaukee and Miller, who were not parties to that case. The opinion delivered by the Wisconsin court may be read to persuade this court to adopt its doctrine; but for no other purpose.

2. In *Pease* vs. *Peck*, (18 *How.*, 599,) this court point out the cases in which the decisions of State courts will be followed, and say: "In all cases where there is a settled construction of the *laws of a State* by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry.

"But when this court have first decided a question arising

under *State laws*, we do not feel bound to surrender our convictions, on account of a contrary subsequent decision of a State court, as in the case of *Rowan* vs. *Runnals*, (5 *How.*, 139.)

"When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions, and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrine, subversive of former safe precedent."

Pease vs. *Peck*, 18 *How.*, 599.

The decision under consideration is within the exceptions, and not the rule above stated:

(1.) It does not depend upon the construction of any statute or constitutional provision of the State; but upon a principle of the common law.

(2.) This court had first made decisions, which must be disregarded to follow the case referred to.

(3.) The decisions of the State court are inconsistent; and the one this court is now asked to follow, reverses numerous well-considered cases in the same court, as well as the decisions of all other courts, state and federal. *It stands alone, and was decided by a divided court.*

(4.) It is not sound in doctrine. I shall consider these propositions in the order in which they are stated above.

First. The decision in the *Judd* case does not depend upon any State statute or constitutional provision.

The ground of the decision is, that certain acts amount to a dedication, and that certain consequences follow as regards the rights of adjacent lot owners; but it is not pretended that any statute of the State touches the question. What is a dedication, and what consequences follow from a dedication, must be determined by the common law.

Second. This court had first decided the very question.

In *Dullen* vs. *Strong*, (1 *Black*, 1,) this court had held that

riparian owners, in the State of Wisconsin, might extend piers and wharves into the water of the lake, until they reached waters navigable in fact; and that any person doing injury to the same was a wrong-doer. In that case the pier extended several hundred feet into the water.

In *Georgetown* v. *Alexandria Canal Co.*, (12 *Pet.*, 91,) and *Railroad* vs. *Ward*, (2 *Black*, 485,) this court had held, that even a nuisance could not be abated by a private person, unless he was suffering special injury from its continuance.

But, in the Judd case, the court holds that a pier or wharf built one inch into the water, although not within hundreds of feet of navigable water, is a nuisance, and that it may be abated by any person.

THIRD. The decisions of the State court are not consistent, &c.

(1.) *Jones* v. *Pettibone*, (2 *Wis.*, 308:) The court held, that whether a river was navigable was a question of fact; and although a stream had been *meandered*, and so returned by the surveyors; and although our statute declares that all streams which have been meandered and returned as navigable by the surveyors of the United States Government are declared navigable to such an extent that no dam, bridge, or other obstruction may be made in or over the same, without permission of the legislature; yet, whether such a stream was navigable in fact remained a question to be established by evidence, wherever it was material. That the owners of land on such stream *held title to the center of the stream;* and the court say: "If the stream is navigable in fact, the public 'have the right to use it for the purposes of navigation, and 'the right of the owner is subject to the public easement. '*But with this exception the right of the owner to use the land as* '*he pleases is perfect.*"

In *Walker vs. Shepherdson*, (4 *Wis.*, 486,) before referred to, the bill was filed to restrain the building of this wharf. The circuit court held, that any erection within the waters of the river, *whether the river was navigable or not at that point*, was

a *nuisance per se*, and that this wharf was therefore a nuisance; *precisely the* doctrine of the Judd case, (4 *Wis.*, p. 506.) But the supreme court rejected this notion, and say:

"This court has decided that riparian owners, who are 'bounded on a stream above the ebb and flow of the tide, 'own the land to the center or thread of the stream; and that, '*where* the stream is navigable, the land covered by it is sub-'ject to the right of the public, to use the stream as a public 'highway for the passage of vessels employed in its naviga-'tion; but that for all other purposes *the right of the riparian 'owner to the use of the land covered by the water is perfect.* '(*Jones* vs. *Pettibone*, 2 *Wis.*, 308.) This principle is too well 'settled by the authorities to be disputed. It follows, that 'both the complainant and defendant, as such owners, have 'the right to use their land, *which is covered by the water of 'the river*, in any way compatible with the use of the stream 'for the purposes of navigation; but this they cannot inter-'rupt. They may, therefore, construct docks or landing 'places for goods or passengers, taking care that vessels em-'ployed in navigating the stream are not impeded in their 'passage, nor prevented from the use of all parts of the stream '*which are navigable.*"

Thus the doctrine of the circuit court, that any erection inside the water line *is a nuisance per se*, was condemed.

In *Kimball* vs. *Kenosha*, (4 *Wis.*, 331,) the court say:

"There can be no real difference between a conveyance of 'a lot or block numbered three, which is in fact bounded by 'a street, or in the conveyance of black acre, bounding it by 'a street or highway regularly named. Unless the street 'is expressly excluded, the grantee takes to the center. It 'is unnecessary to cite authorities to this proposition. The 'dividing of land into lots, blocks, and streets, the lots and 'blocks numbered, and all bounded by streets in fact, and 'described in the deeds of their conveyance by numbers, 'cannot, by any means, be regarded as an express exclusion 'of the street on which they abut, and without which the 'lots would be unquestionably useless." And the court held

that when a street laid out on a plat was vacated, it reverted to the adjoining lot owners, each taking the half adjoined to his lot.

In *Mariner* vs. *Schulte*, (13 *Wis.*, 692,) the court affirmed all the former decisions on this subject, and applied the same principle to a new and interesting state of facts. There a bayou, which was originally a stream and an arm of the Milwaukee river, was filled up entirely, and the lot owner was held to own across it to the adjoining street.

After the decision of the court in *Walker* vs. *Shepherdson*, (4 *Wis.*, 486,) holding that this wharf was a legal erection, and after Yates had been twice acquitted on an indictment charging the wharf to be a nuisance, Jonathan E. Arnold, the grantee of the original proprietors of all that part of lot 6, section 29, "which was not laid off in lots and blocks, and 'set off to proprietors of said lot 6 in the partition of the 'same, made by the district court for Milwaukee county, 'November term, 1837," commenced an action of ejectment against Elmore, who was then in possession as tenant of Shepherdson, to recover a part of this wharf.

This action involved the question of the right to maintain the wharf; because it is well settled, and was expressly decided by the supreme court of Wisconsin, in *Gardner* vs. *Tisdall*, (2 *Wis.*, 153,) that "the original owner, or those 'claiming under him, of land dedicated to public use, may 'maintain ejectment against a permanent occupier incon-'sistent with, or repugnant to, the purpose of the dedication 'or grant;" so that, if the maintenance of this wharf was an unauthorized use of the land on which it is erected, the plaintiff in that case was entitled to recover. But Arnold was defeated; and the court delivered an opinion, exhibiting some surprise, not to say displeasure, at the attempt made by counsel to escape from the binding authority of *Jones* vs. *Pettibone*, (2 *Wis.*, 308;) *Mariner* vs. *Schulte*, (13 *Wis.*, 692;) *Walker* vs. *Shepherdson*, (4 *Wis.*, 486;) *and Kimball* vs. *Kenosha*, (4 *Wis.*, 321.) The court, after considering the plat given in evidence in this cause, and found in this record at page 54, and quoting from it, say:

"What stronger evidence could be afforded that the origi-
'nal proprietors of fraction six, when they platted it, in-
'tended that the lots bounded by a highway or river should
'extend to the center of the highway or river, subject, of
'course, to the public easement, *without any reservation what-*
'*ever*," &c.

Then comes *Judd* vs. *Yates*, (17 *Wis.*, 118,) in which the court overthrow all the preceding cases, and declare this wharf to be a nuisance.

FOURTH. *Judd* vs. *Yates* is an erroneous decision, and ought not to be followed.

(1.) It is erroneous in holding that by the platting of the land upon the bank of the river, and representing the river as it existed in nature, the proprietors intended to, or in law did, part with their rights as riparian owners.

The court, speaking of the plat, say:

"Highways by land and highways by river
'clearly delineated and their boundaries fixed, s
'*same footing*, and that it is immaterial whether the
'ally passable in the whole extent or not. *If not p*
'*public have the right to make them so*," &c.

No authority is cited, nor reason given, for this declaration; none can be.

The doctrine is asserted, and a new principle promulgated, utterly subversive of private rights by main strength. There is no pretense of pre-existing law to this effect. When the proprietors made the plat, no one had ever heard of such a thing, and hence they cannot be presumed to have intended such result.

The distinction between *land* and *water* is founded in nature; and for that reason, and perhaps only for that reason, is beyond the septic touch of any court.

When a proprietor makes a plat, and lays out a street on his own land, it is fair to say that he intended to establish a highway of the *precise dimensions* indicated by his plat; for the simple reason, that it was made a highway *only by his act;* and, if he had not intended to make it a highway to the extent indicated, *why did he so indicate it?* But Milwaukee river

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"Highways by land and highways by river, wherever 'clearly delineated and their boundaries fixed, *stand on the 'same footing*, and that it is immaterial whether they are actu-'ally passable in the whole extent or not. *If not passable, the 'public have the right to make them so*," &c.

No authority is cited, nor reason given, for this sweeping declaration; none can be.

The doctrine is asserted, and a new principle promulgated, utterly subversive of private rights by main strength. There is no pretense of pre-existing law to this effect. When the proprietors made the plat, no one had ever heard of such a thing, and henec they cannot be presumed to have intended such result.

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does not owe its existence, *nor its capacity*, to any proprietor's plat. It would have been a river, and just such a river as God made it, plat or no plat. Because the proprietors made their plat, which truly represented the face of nature at that point, and represented the water of the river where the water was, there is no more reason in saying that they intended thereby to make the river navigable, where it was not so, than to say they intended to have the waters changed from fresh to salt water. To say that in platting land bordering upon a river the proprietor, to save his rights as a riparian owner, must make soundings in the river, and indicate the actual navigable channel, or, in default of so doing, he surrenders all privilege of reaching the actual channel by piers, wharves, &c.,—a right always exercised, even on our largest lakes and the oceans themselves,—is little short of absurdity; and to punish these proprietors by a forfeiture of their previously acknowledged rights, for not taking a precaution which, at the time the plat was made, was not considered, nor ever decided, to be necessary, is to effect a practical confiscation of his property, and is wholly unjust, no matter who may decree the sacrifice.

Suppose a proprietor on the Milwaukee river to-day, enlightened by the decision under consideration, were making a plat, and should by soundings determine the present actual navigable channel of the river, and indicate it on his plat, and expressly reserve his riparian rights as to all land between the bank and the channel. Then, suppose the channel of the river should the next year, from wholly natural causes, change ten feet either way: which would determine the precise situation of the navigable part of the river, the plat or the fact? It is notorious that the navigable channel in all our western rivers is constantly changing. A map which should accurately represent it to-day, would be wholly unreliable to-morrow.

And the sensible doctrine is that which everybody knows corresponds with the fact, that in platting land bordering upon a river the owner intends to mark only the line of separation, as it exists in fact between land and water,

without intending to indicate where the navigable channel is at present, or to predict where it will be in the future; and that, as a riparian proprietor, he intends to retain the right to reach the navigable channel of the river, wherever it is or may be, with piers and wharves. And for any court, long after a plat has been made, to coin a totally new doctrine, like that of the decision under consideration, and to *presume* that a proprietor intended *what every man knows he did not intend*, is to strip a man of his property and apply it to a public use without compensation.

In *Mayor of Rochester* vs. *Curtis*, (*Clarke's Reports*, 336,) the court held, that a river, which was declared *by statute* a public highway, *was such only for the purposes of navigation, and was not such highway in places where it was in fact not navigable.*

In *Spooner* vs. *McConnell*, (1 *McLean*, 352,) and in *Palmer* vs. *Commissioners, &c.*, (3 *McLean*, 227,) the court say, that the ordinance of 1787, declaring that certain "navigable waters" shall be common highways and forever free, &c., refers to those waters "*in their natural state.*"

In the light of these decisions, look at this plat. It says,—that is, it represents,—the land as stopping, and the waters of the river as commencing, at a certain point. It does not say that the river is navigable for the whole extent covered by water, nor does it say that it is navigable at all. It simply says *it is a river.* Now, says the supreme court of Wisconsin, the proprietor has, by saying where land stops and water begins, said *that it is a navigable river;* and not only a navigable river, as many rivers are, *in its channel*, but that it is navigable throughout its *entire extent*, as *no river ever was.*

Upon the principle of this decision, if a proprietor, platting a town, delineates a spring of water, a "duck pond," or a trout brook, he will be deemed *and doomed* solemnly to have dedicated the same for the purposes of navigation. It is of no consequence that navigation there is utterly impossible. By representing it in its true form and dimensions he has estopped himself to assert what the truth is in regard to a subject, as to which he has never spoken, and the court will

strip him of his rights as a riparian owner. The smallest rivulet represented upon a plat becomes in law a navigable stream and public highway.

By the cases last quoted it was held, that a *statute* declaring a stream a *public highway* only made it such in places where *it was, in fact, navigable;* and the ordinance of 1787, which provided, "The navigable waters leading into the Missis-'sippi and St. Lawrence, and the carrying places between 'the same, shall be common highways, and forever free," &c., only created highways where there was navigable capacity, *in the natural state of the river;* yet this decision gives to a plat which says *nothing upon the subject* greater effect than the court in those cases gave to a *statute expressly declaring the river to be a highway.* The proprietor, by merely representing a river on his plat, says nothing in regard to the river, whether it is navigable or not; whether it is public or private; whether the tide ebbs and flows or not; or whether it is a highway or not. It simply says, *here is the river.* But the court in this decision takes up the theme where the proprietor left it, and in his name adds: "This is 'not only a river, but it is a highway; and not only a high-'way where it is navigable, but it is a highway in every part 'of it, *whether navigable or not.*"

In *Wethersfield* vs. *Humphrey*, (20 *Conn.*, 218,) the court say:

"The navigation, the obstruction of which is a public nui-'sance, is on waters whereon the public pass and repass with 'boats and vessels in the prosecution of commerce *essentially* 'valuable."

In *Rowe* vs. *Granite*, (21 *Pic.*, 344,) the court say, that to be navigable, in the sense of the law, the water must be passable, "not with skiffs, &c., only, but generally and commonly, 'and for some purpose useful to trade or agriculture."

In *Walker* vs. *Shepherdson*, (4 *Wis.*, 510,) the court, speaking of *this wharf*, say:

"The complainant, it appears, instead of constructing his 'dock along the margin of the river, *on the line where the water* 'is of sufficient depth to permit vessels to navigate it, has built his

'dock in a place *where excavation of the earth was necessary in* 'order to permit vessels to approach it; in fact, constructing a 'basin with two points, one of which is towards the river as 'it flows by the lots, and the other towards the descending 'stream."

The proof in this record shows that the wharf at present existing does not reach to within *one hundred and fifty feet* of that part of the river which was *navigable in its natural state.*

(2.) This decision is erroneous, and in conflict with former decisions of the same court, even if this wharf be a nuisance, in holding that the defendant, Judd, could destroy it, without showing that he was specially injured by it, or that it was an actual hindrance to him in exercising his right to navigate the river. The answer of the defendant attempted to show special damage, but there was no proof of it at the trial; and in the decision of the case by the supreme court it was wholly ignored. The broad doctrine was declared, that if the owner had encroached upon public right by the erection of this wharf, he was an outlaw to that extent; and that any individual who felt so disposed might destroy it.

Such is not the law of that court.

Walker vs. *Shepherdson*, 2 *Wis.*, 384.
Barnes vs. *Racine*, 4 *Wis.*, 454.
Walker vs. *Shepherdson*, 4 *Wis.*, 486.
Carpenter vs. *Mann*, 17 *Wis.*, 155.

It is not the law of this court.

Georgetown vs. *Alexandria Canal Co.*, 12 *Pet.*, 91.
Railroad vs. *Ward*, 2 *Black*, 485.

It is not law *at all.*

Broome's Com., page 250.
Bridge Co. vs. *Smith*, 30 *N. Y.*, 44.
Rogers vs. *Baker*, 31 *Barb.*, 447.
Clark vs. *Syracuse*, 31 *Barb.*, 32.
Dimes v. *Petley*, 15 *A. & E.*, (*N. S.*,) 276.
Bridge v. *R. R. Co.*, 3 *Mees. & W.*, 244.
Davis v. *Mann*, 10 *Mees. & W.*, 546.
Mayor of Colchester v. *Brooke*, 7 *Q. B.*, 339.

IX.

The decision in the Judd case is not applicable to this, because the facts shown here are wholly different from the case shown in the record, upon which the court made their decision. The case was before the supreme court from a first trial in the court below. The plaintiff gave such evidence as that court held sufficient to entitle him to judgment. There was no evidence given, as there is proof in this record, that Yates had been three times indicted and acquitted, and that the right to maintain the wharf was established by repeated judgments; nor that the city had abandoned all claim to regard it as public, and had for years taxed it as private property, and actually sold it, and by deed conveyed it to the occupier.

On the contrary, I think it may be maintained that on this record the decision of that court would be in our favor; certainly it would be, unless some new theory should be devised to defeat this plaintiff. The court held that by the plat the proprietor had dedicated the land within the water lines, and that the city had accepted the dedication by establishing dock lines, and thus the right of the public had been established. Very well; if an acceptance by the city was necessary to perfect the public right, abandonment by the city would cause it to revert to the owner. It was expressly decided by that court in *Kimball* v. *Kenosha*, (4 *Wis.*, 321,) that where a street, made such by dedication, was abandoned, the land to the center of the street reverted to the adjoining lot owners. Certainly the taxing of this land and the conveyance of it by tax deed, was abandonment. The deed from the city to the complainant's grantor settles the question of abandonment by the city; and the three successive acquittals, on charge of maintaining a nuisance, establishes the right between the occupier and the State, and as against the city proceeding in the name of the State.

MATT. H. CARPENTER.

Supreme Court of United States.

RYNIER V. YATES, Appellant,

against

THE CITY OF MILWAUKEE AND ALEXANDER MILLER.

NO. 52, DECEMBER T.

Brief for Defendants.

E. G. RYAN,
Attorney of the City of Milwaukee.

Paul & Cadwallader, Printers, Milwaukee.

SUPREME COURT

OF THE UNITED STATES.

RYNIER V. YATES,
Appellant.

against

THE CITY OF MILWAUKEE
and ALEXANDER MILLER.

This is a bill for a perpetual injunction to restrain the city of Milwaukee from using, as part of the public water highway of the Milwaukee river, within the corporate limits of the city, a former projection into the waters of the river, as seen on diagram at page 46 of the record, of which the complainant claims to be seized, with present and perpetual right of use, in private property.

As will be seen, this question was fully litigated, by the grantor of the complainant, in the courts of the state, by the same counsel representing the complainant in this cause, elaborately considered by the Supreme Court of the State, and decided in favor of the right of the city.

And the transfer of the title to the complainant, and of the litigation from the state to the federal courts, is a transparent attempt to induce this court to violate one of its own wise and settled

rules, by disregarding, in favor of this complainant, the state adjudication in this controversy, giving construction to the state statutes, relating to the titles of land within the state.

I

Conflicting rules of decision, by different courts, affecting rights within the same jurisdiction, are an evil of great magnitude, and when applied to the tenure of land, would be an intolerable plague. Within the scope of mere municipal law, in an agricultural country like this, perhaps in any country, nothing is so essential to public prosperity as the certainty of title to land. Any rule of decision is better than uncertainty in the rule.

The double system of state and federal judiciary peculiarly exposed the states of this Union to conflicting rules of judicial decision. This was foreseen and guarded against from the beginning by the great and wise jurists, who first gave moral dignity and weight to the decisions of this tribunal. And every forgetfulness of their wise rules, to reconcile state and federal adjudications, has tended to evil and to bring scandal upon the administration of justice.

When the question first arose, Marshal, C. J., after stating the opinion of the court that a deed, in the chain of title, was not regularly proved, adds:

"But in construing the statutes of the state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has long been established in the state; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act." 5 Cranch, 32. He repeats the rule in 9 Cranch, 98; very emphatically in 10 Wheaton, 159; and

again yields the opinion of this court, to a single decision mad e by two judges only, in a state court consisting of four judges, 10 Wheaton, 461.

The same effect is given to a single decision, 8 Peters 240.

I know of no decision of this court to the contrary, relating to the title of land. The exceptions to the general rule applying to all state statutes, stated by the court in 18 Howard 598, have no application in this case. I refer generally to 6 Wheaton 127; 20 Howard 194; 2 Black 577, 603; 4 Wallace 230; 6 Wallace 115, 124.

The rule, if here applied, is conclusive of this case.

II

The grantor of the complainant asserted the same right, to the same premises, in an action in the state courts of Wisconsin. The decision of that case, by the Supreme Court of the state is found in 18 Wisconsin 118. The decision seems so conclusive, that I do not feel myself at liberty to state the merits of the principal question, otherwise than by reproducing the entire report. It disposes of all the merits of the present complainant's case; and it is respectfully submitted that it is conclusive on this court, under its own rule of decision.

YATES vs. JUDD.

APPEAL from the County Court of *Milwaukee* County.

The complaint avers that at the time the defendant committed the grievance hereinafter mentioned, the plaintiff was, and still continues to be, possessed of a certain premises in the city of Milwaukee, the eastern line of which is the thread of the Milwaukee river, and the southerly line is the north side of Point street; that the defendant was possessed of a parcel of ground on the opposite or southerly side of Point street; that before that time

that portion of said street that passed by the plaintiff's premises, having once been partially covered by the shallow and unnavigable waters of the river, had been filled up and graded for about half its width, namely, the half adjoining the plaintiff's premises, and constituted the only way by which the plaintiff could have access to his premises by land without trespassing upon the lands of other persons; that on the 1st of June, 1857, and on divers other days before the commencement of this action, the defendant wrongfully excavated and dredged said street adjoining plaintiff's premises, to a great depth, and caused it to be flowed with water; and that, by reason of such excavation and dredging, the plaintiff's premises were undermined, sunk, and wasted away, and said street so destroyed as no longer to afford the plaintiff access to his premises; to his damage, &c.

The answer alleges that the premises described in the complaint as the property of the plaintiff are a part of fractional lot 6, section 29, &c.; that said fractional lot 6 was, about the 24th of June, 1837, the property of certain persons named; that said proprietors on that day executed a plat of said lot, on which they laid out and designated the premises described in the complaint, as a part of the Milwaukee river, and dedicated them to the public use as a highway by water; that the river upon said premises was then navigable; that afterwards a part of said proprietors impleaded the others in a suit in the district court of the then territory of Wisconsin for said county, for the partition of said lot 6; that by the consent of the parties to the suit, said plat was adopted by the court, and partition adjudged with reference to the lots, streets, alleys, and rivers designated on it; that the premises mentioned in the complaint became thereby dedicated to public use as a highway by water, and were thereafter used by the public as such, and said highway has never since been vacated or abandoned; that afterward the plaintiff wrongfully entered upon a part of said highway, being a part of the premises described in the complaint, and obstructed the same by filling up the bed of the river with earth, driving piles therein, and constructing a dock extending about one hundred feet eastwardly from the west dock line of said river at that place, and occupied the same for private use, and thereby obstructed the defendant from passing over said highway, which is the same possession of the plaintiff that is set forth in the complaint; and that the defendant holds the premises occupied by him as described in the complaint, and which are a part of said lot 6, as lessee of parties who derived title thereto from certain of the proprietors between whom partition was made as above stated. The answer contains further averments not necessary to be here stated.

On the trial, the plaintiff's evidence tended to show that the premises occupied by him, as described in the complaint, lay east of the "ordinance dock line" established by the common council of Milwaukee along the west side of the Milwaukee river; that the depth of water there, when the plaintiff constructed his dock, was from one and a half to four feet, the average being about three and a half feet; that plaintiff's dock was built up to about four feet above the surface; that it extended south of the north line of Point street a distance varying from fourteen to thirty feet; that in consequence of defendant's dredging not only in front of the lot occupied by him but also in the space between that and plaintiff's dock the latter was partially destroyed, and especially that the ground which the plaintiff had filled in south of the north line of Point street to furnish access to the rest of the premises, and which is described in the complaint as a part of Point street, was washed away. The plaintiff, having been examined as a witness on his own behalf, testified, on cross-examination, that the proprietors of fractional lot 6, section 29, (mentioned in the answer) executed a plat of the same; that a plat then shown him by defendant's counsel was the one so executed; and that said lot 6 had been partitioned among the proprietors, and said plat was adopted by the court in the partition, and made a part of the record therein. The original plat and the record in the partition suit were then introduced in evidence by the defendant. An engraving of part of said plat is given herewith.

It appears that that portion of fractional lot 6 immediately northwest of plaintiff's premises is designated on said plat as block 158, and the block opposite on the southerly side of Point street, as block 157; that all the lots in those blocks, including those adjoining the river, are marked as 100 feet long and 40 feet wide; that said lots adjoining the river, like the others in the same blocks, are delineated as rectangular, and their riverward boundaries as straight lines; that the lines so delineated cut in places the curved and waving line which represented the natural edge of the stream, whereas in the case of other blocks on the same plat the riparian lots were not bounded by straight lines on the riverward side, but only by the waving line which represented the water's edge. The most easterly lot in block 158 is delineated on the plat as lot 1, and the premises claimed by the plaintiff were southeast of said lot 1, and were entirely covered by water until filled by him. The premises occupied by the defendant were lot 1, block 157.

The following instruction was asked by the defendant, but refused by the court: "If you find from the evidence that the whole premises in question possessed by the plaintiff are within

the limits of the highway as dedicated by the proprietors, and that the public have never by any act abandoned the same, the plaintiff cannot recover." Other instructions involving substantially the same point were also refused. The defendant then asked the court to instruct the jury that he "had a right to dredge carefully and deep enough to allow the passage of vessels, up to the extension eastward of the center line of Point street, in front of his own lot to the thread of the stream;" but the court modified the instruction by adding that "the defendant would be liable to his neighbor in damages, if, from his so dredging, injury should follow to his neighbor's premises on the other side of the line."

Verdict and judgment for the plaintiff.

E. Mariner and *Wells & Brigham*, with whom was *O. H. Waldo*, for appellant.

1. The *locus in quo* is a public highway. (1.) The Milwaukee river is a navigable stream, and as such is a "public highway, forever free." Ordinance of 1787; Const., Art. IX, sec. 1. That it is a navigable stream is a fact of which this court will take judicial notice. 1 Greenl. Ev., § 6; Story's Eq. Pl., § 24; *The Apollon*, 9 Wheat., 374; *Peyroux vs. Howard*, 7 Pet., 342. Many public acts of the territory and state of Wisconsin, and of the United States, recognize it as a navigable stream. It was meandered as such by the federal government. The following acts of the state and territory authorize bridges over it and provide for draws therein for the passage of vessels: Laws of 1836, p. 47; 1838–9, pp. 13 and 126; 1839–40, p. 7; 1843–4, p. 39; 1845, p. 53; 1846, p. 101; 1849, p. 38; Local Laws of 1862, p. 332. The following acts authorizing bridges provide that they shall not obstruct the navigation of the river: Laws of 1851, pp. 126, 272; 1852, pp. 317, 386; Local Laws of 1853, pp. 48, 621. The following judicial decisions recognize it as navigable. *Walker vs. Shepardson*, 4 Wis., 508–9; *Mariner vs. Schulte*, 13 id., 708–9. (2.) This river is expressly declared to be a public highway and forever free, &c., by "An act to incorporate the Milwaukee Manuf. & Hydraulic Co." Session laws of 1839, p. 135. The river, being a highway, is such in its whole width, from bank to bank, although some portions are too shallow for some uses; just as a street is none the less a highway because it is not worked and fit for use in its whole width. Angell on Highways, ch. 1, § 56; 3 Kent's Comm., 427; *Keen vs. Stetson*, 5 Pick., 494; *Lansing vs. Smith*, 4 Wend., 21; *Commr's. &c. vs. Long*, 1 Parsons' Select Cases, 143; *Stetson vs. Faxon*, 19 Pick., 147. (3.) The premises in question are made a public highway by water by *dedication* of the owners of the fee and acceptance by the public. By the plat made by the proprietors (and afterwards adopted and re-

corded by the court, in the partition suit), the streets, alleys, rivers and proposed canal, as designated thereon, were dedicated to the public use. Angell on Highways, § 142; Laws of Mich., 1833, p. 531; Laws of 1837–8, p. 242. Those who purchased lots with reference to such dedication have a vested right to the use of such highways. *Logansport vs. Dunn*, 8 Ind., 378. The public accepted this dedication of the river by the establishment of a dock line. This court has already decided in *Arnold vs. Elmore*, 16 Wis., 509, that by the plat the entire area is disposed of, and is either set off in lots and blocks in severalty among the proprietors, or is designated for streets, canal, &c. What disposition, then, did the owners intend to make of the space in front of lot 1, block 158, and block 157? We say they designed it, as a part of the Milwaukee river, for a highway by water. To forestall any claim to the private use of that space because the water is shallow, they marked on the plat the western boundary of that portion of fractional lot 6 which they dedicated to the public as a highway by water. (A.) Wherever they intend lots to be bounded by the stream without specially limiting the line of the stream, they have designated the water boundary by a *waving* line; but where they intended to mark the precise dimensions of the parcels dedicated to the public use, as the streets, proposed canal, &c., they have designated the boundaries by *straight* lines. (B.) Lot 1, block 158, and all the lots in block 157, are marked 100 feet long by 40 feet wide. If the lots in block 157 were intended to be of indefinite length, and lot 1, block 158, to be of indefinite breadth, why not leave them unmarked and bounded by waving lines like lot 1, block 147, and the lots in block 146? It will not be denied that the length of lots 10, 11, 12, &c., in block 145, was definitely fixed at 130 feet, and that outside of that line was highway. But were the boundaries of those lots more definitely fixed than those of lot 1, block 158, and the lots in block 157? Are not the limits of the highway by water in front of block 157 as definitely fixed on the plat as are those of the street east of block 145? It is to be observed that the basin which includes the premises in dispute is peculiarly adapted to public use as a mooring ground and winding place for vessels. It is at the junction of two navigable rivers, in the heart of a town that even then bid fair soon to become a crowded mart. It is so covered by water as to be unfit for buildings, and by a little improvement can be made a most valuable basin for the use of commerce. Can it be doubted that the proprietors, foreseeing the need of just such a place for the public use, dedicated this bayou for that purpose? The fact of its shallowness in some places may have furnished the very reason for such dedication.

If it had been actually used then as a navigable stream, it could not possibly have been necessary to dedicate it; but it being shallow, they fixed the boundary by lines and measures that could not be mistaken. (C.) The commissioners who made partition of fractional lot 6 provide on their plat (to which the owners, as parties to those proceedings, assented) that "if the streets, river and proposed canal shall not be continued as public highways, then the lots opposite shall be extended to the center of such streets, &c." This shows that, until it should be abandoned, the owners dedicated the space outside the east line of blocks 157 and 158 to the public use, whether it was in fact navigable or not. They could not have supposed that the then navigable part of the river would ever be abandoned, and could not have intended to provide for that, but for the rights of lot owners in case any or all of this ground covered by shallow water should be abandoned to the public. (D.) The lots on block 157 are designated by the plat as *water lots*. By that term, we suppose, are meant lots which have water front—which are approachable by water. As such they have been purchased and are now held. But if the plaintiff and the owners of lots southeast of defendant's premises have a right to fill up to the central and actually navigable part of the river, they can shut the defendant off entirely from the stream. 2. If the premises were a highway by water, the plaintiff's filling was such a nuisance as the defendant might peaceably remove. Angell on Highways, § 274.

Peter Yates, in person, and *Matt. H. Carpenter*, of counsel, contended, that the common law and not the civil law rule as to the rights of riparian proprietors, is in force in this state (R. S., ch. 41, sec. 3); and that a navigable stream is a public highway only as to that part of it which is "of sufficient depth to permit vessels to navigate it" in fact, and where artificial excavation is unnecessary. *Walker v. Shepardson*, 4 Wis., 486, 510; *Mayor of Rochester v. Curtiss*, Clarke, 336; *Spooner v. McConnell*, 1 McLean, 352; *Palmer v. Comm'rs of Cuyahoga Co.*, 3 id., 227; *Comm'rs of Canal Fund v. Kempshall*, 26 Wend., 404; *Canal Comm'rs v. The People*, 5 id., 423. The navigation referred to in this definition is not an occasional passage of skiffs, &c., but navigation "generally and commonly," and with vessels engaged in the "prosecution of commerce essentially valuable." *Weathersfield v. Humphrey*, 20 Conn., 218; *People v. Platt*, 17 Johns, 211; *Rowe v. Granite Bridge Corp.*, 21 Pick., 344. There can be no doubt that Point street extends to the river, *i. e.* to the navigable part of it, and that the owners of property on each side of it own to the center thereof, subject to the easement of the public as a highway by land; and even "where a city is laid out with

streets running to the water, such streets should be held to continue on to the high water, if the city front is afterwards filled in, or the space enlarged by accretion or otherwise." *Wood v. City of San Francisco*, 4 Cal., 190. Point street not being a public highway by water, and the property on each side of it being entirely private, because in the natural state entirely unnavigable, the plaintiff had the same right, title and interest in Point street at that place that other lot owners have in the street fronting their premises: and any excavation resulting in special damage affords a cause of action. "No owner of land over which a road passes has right to make any change in it, but in the manner prescribed by law." *State v. Young*, 27 Mo., 259.

By the Court, DIXON, C. J. I think the defense in this case fully sustained upon the doctrine of dedication; that the premises for the injury to which the plaintiff complains, were devoted by the original proprietors to the public use as a highway by water, and consequently that the grading, filling and other works of the plaintiff within the line of such highway, by which it is blocked up and destroyed, were a public nuisance. I do not care to repeat the argument found in the brief of defendant's counsel, which so ably, and in my judgment unanswerably, sustains this conclusion. I am reminded of nothing which I might add, and I am certainly not disposed to qualify or limit any of the propositions of the learned counsel under this head.

I also think that the same conclusion is sustained by the opinion of this court in the recent case of *Arnold v. Elmore*, 16 Wis., 509, with reference to this same plat. Speaking of the original plat, and that of the commissioners in partition, and of the effect to be ascribed to them as evidence of the intention and purposes of the proprietors, this question and answer occur: "What stronger evidence could be afforded that the original proprietors of fraction 6, when they platted it, intended that the lots bounded by a highway or by the river, should extend to the center of the highway or river, *subject of course to the public easement*, without any reservation whatever, except where it was made for the proposed canal? This is the clear intention manifest from the plat and the record in the partition suit, and of course could not be removed by parol evidence." I still think that document conclusive of the intention of the proprietors, and, as indicated by the question, that highways by land and highways by river, wherever clearly delineated and their boundaries fixed, stand on the same footing, and that it is immaterial whether they are actually passable in the whole extent or not. If not passable, the public have the right to make them so, and for that purpose to see that they are kept clear from additional obstructions and incumbrances. As to highways by land

this conclusion is undisputed. The same rule applies with equal force to a highway by water. The object of the proprietors, wherever they fixed the limits of the highway by water by prescribing the boundaries of lots and blocks adjoining the river, undoubtedly was to give space for improvement, and to allow the navigable channel of the river to be widened to meet the future wants of trade and commerce. To say that the space thus dedicated to improvement by enlarging the navigable capacity of the river, may be filled up and appropriated to private uses, is to defeat the obvious purpose of the proprietors, to deprive the public of manifest and most important advantages, and, in many cases, to injure and defraud the proprietors of adjacent lots, who have purchased relying upon the boundaries fixed by the plat. In this case, the premises occupied by the defendant, though platted and purchased as bordering upon the river, would be entirely cut off from it. The original proprietors having the land between the line of actually navigable waters and the shore at their disposal, it seems to me that there can be no doubt of their power thus to dedicate it. They obviously would have the same power of disposition as over the dry land, and might limit their rights and the rights of their heirs and assigns by the same means. They might estop themselves and their heirs and assigns forever from asserting any dominion over it inconsistent with the public use so long as that use continued, or until it was unequivocally abandoned, though the title still remained. This I understand to be the principle upon which the doctrine of dedication rests (*Connehan v. Ford*, 9 Wis., 244,), and I think it fully applicable here.

Believing, then, that the owners could dedicate, and that they intended to do so, it only remains to be determined whether their acts have been ratified on the part of the public, so as to make the dedication complete. I think they have. The establishment of the "dock line" by the common council of Milwaukee, under the authority granted by the legislature, was a clear acceptance of the lands dedicated. It is true that the "dock line" is within the line of dedication, thus abandoning a part; but so far as it goes, it is an unequivocal acceptance, and thoroughly establishes the public right.

As to the remarks of this court in *Walker vs. Shepardson*, 4 Wis., 511 and 512, to which we are referred by counsel for the plaintiff, that the legislature could not authorize the establishment of a "dock line" within the non-navigable waters of the river without compensation to the riparian owner, it is sufficient to say that the question of a right by dedication is not mentioned. It is as well settled that the public may acquire an easement or use with the assent of the owner without compensation, as that it can-

Walker *vs.* Shepardson, 2 Wisconsin, 384, is in entire accord with Yates *vs.* Judd.

The same case, 4 Wisconsin, 511, is not in conflict with Yates *vs.* Judd.

1st. All that is quoted to show the two cases in conflict is *obiter dictum.* The case was decided on the sole ground on the complainant's want of right.

2d. It is not inconsistent with the principle of dedication on which Yates *vs.* Judd rests, that the riparian owner takes to the center of the river, and that the public cannot, without compensation, establish a dock line to intrude upon his possession.

Gardner *vs.* Tisdale, 2 Wisconsin, 153, on the doctrine of dedication, is in entire accord with Yates *vs.* Judd, and shows that Yates *vs.* Judd does proceed on the interpretation of a State statute.

Kindale *vs.* Kenosha, 4 Wisconsin, 321, deciding that the fee of platted streets is in the owner of adjacent lots, is in no wise in conflict with Yates *vs.* Judd.

Barnes *vs.* Racine, 4 Wisconsin, 454, on public and private right in navigable streams, is in accord with Yates *vs.* Judd.

Merwin *vs.* Schulte, 13 Wisconsin, 692, on the right of a lot owner to the center of two highways in front, one of land and the other of water, does not conflict with Yates *vs.* Judd.

Carpenter *vs.* Mann, 17 Wisconsin, 155, decides only the simple principle that a private person, averring no special damage, cannot maintain an action for a public nuisance.

not do so against his will except upon payment of the fair value of the property taken. Both propositions being well established, and the former not noticed, I am bound to assume either that it was not brought to the attention of the court, or that it was inadvertently overlooked. It is never safe to assume a point as decided upon which the opinion is entirely silent. Besides, it appears that what was said upon this subject was regarded by the court as somewhat *obiter*. This may account for any apparent want of care in the examination of the point.

I think the judgment below should be reversed, and a new trial awarded.

COLE, J., dissented.

And this is not a solitary decision. The same principle was held by the Court, in relation to other premises on the same plat, in Arnold vs. Elmore, 16 Wisconsin, 509. And the principle is not questioned in any decision of the Court. Walker vs. Shepardson, 4 Wisconsin, 511, is sufficiently explained in Yates vs. Judd.

The plaintiff in that case was the grantor of the complainant in this, and the defendant in that case rested upon the public right to the water high-way. This gives to the case almost the effect of *res adjudicata*, conclusive on the complainant here.

These considerations really dispose of the present appeal. Some incidental points were made in the Court below for the complainant; but the real merits of the case rest upon the questions settled in Yates vs. Judd. I shall therefore only advert briefly to the other points.

III

The complainant relies upon the taxation of that part of the Milwaukee river, which he claims, by the officers of the City of Milwaukee, as private property; and upon a tax deed issued by its Treasurer for non-payment of taxes.

The fact is at least doubtful. The answer denies, and the proof does not seem to me satisfactorily to establish, that the taxes or tax-deed relate to the *locus in quo*.

But, were this otherwise, it can hardly be necessary to argue in this Court, that the officers of a municipal corporation have no power, by mistake or fraud, to tax a public highway, and thereby either estop the public from asserting the public use, or vest a right of property in a purchaser, to the exclusion of the public use. This would be true of a public street, which the proper corporate bodies, for proper reasons, and in a proper way, could close; *a fortiori*, is it true of a water highway, made so by national law for national use, long before the existence of the city of Milwaukee or the state of Wisconsin.

Whether the tax-payer, or the purchaser at a tax sale, in such a case, might not have a personal remedy against the city, is not a question here.

IV.

It is set up that the grantor of the complainant was indicted for a public nuisance, in erecting his obstruction, and acquitted; and this is alleged to bar the public right in that part of the river.

This would not be a defence to a suit by the city to abate the nuisance. Rex v. St. Pancras, Peake, 220. Shadwell v. Hutchinson, 2 Barn. & Adol., 97; 2 Phillips' Ev., 26.

A fortiori, it will not avail the complainant as the foundation of a suit.

The privity of the city to the indictment is not established. It was no part of the duty of the comptroller to make the complaint, nor could he make it officially. And the city could not take part in the prosecution. Butler v. Milwaukee, 15 Wis., 493.

Be that as it may, the acquittal of the complainant's grantor could not operate to vest a right in a public highway; and unless it could have that effect, it is of no weight in this case.

It can hardly be necessary to say, that an interlocutory order refusing an injunction in a suit brought by the city, and the failure of the city to prosecute that suit, constitute no bar.

V.

Argument was made in the Court below, that the City had no power to remove the obstruction. The City, by its Charter, has charge of all the public highways within its corporate limits, and has a special duty to keep the river dredged to a sufficient depth. It is therefore difficult to see the force of the argument. This point also is settled by Yates vs. Judd. If a private person had right to remove this obstruction, certainly the City had.

On the whole, this Court is implored not to over-rule the State disposition of this litigious pretence of the complainant; and not again to obtrude this miserable obstruction into the waters of the river, from which it is now happily removed.

E. G. RYAN,
Attorney of the City of Milwaukee.